Supreme Court, U.S.
FILED

No. 931439 FEB 18 1994

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALEXANDER HOSKINS, Individually, and in his official capacity as the Commissioner of the Philadelphia Streets Department,

Petitioner

V.

ELIZABETH KINNEY; GLENN NIMAN; DANIEL C. SULLIVAN; DIANE FATULA; CASSIE JAMES; ERIK VON SCHMETTERLING; JOHN GLADSTONE; TOM LEVINE; CHARLES HOMILLER; RONA SCHNALL; MARY BARNES; ANN McLAUGHLIN; DISABLED IN ACTION OF PENNSYLVANIA, individually and on behalf of all others similarly situated,

Respondents

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

Petition For Writ Of Certiorari

Michael F. Eichert, Jr.
Divisional Deputy City Solicitor
Counsel of Record

City of Philadelphia Law Department
1600 Arch Street, 8th Floor
Philadelphia, PA 19103-2081
(215) 686-5247

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in granting summary judgment in favor of respondents on the basis that 28 C.F.R. § 35.151(e)(1), promulgated by the Department of Justice pursuant to the Americans with Disabilities Act of 1990, 42 USC § 12101 et seq., requires that curb ramps for the handicapped be installed whenever a street is resurfaced?

2. Did the Court of Appeals err in holding that Petitioner Hoskins was not entitled to assert the defense that mandatory installation of curb ramps for the handicapped whenever a street is resurfaced will result in undue financial burden for the City of Philadelphia?

LIST OF ALL PARTIES

The Petitioner herein is Alexander Hoskins, the Commissioner of the City of Philadelphia Streets Department.

The Respondents are:

Elizabeth Kinney,

Glen Niman,

Daniel C. Sullivan,

Diane Fatula,

Cassie James,

Erik Von Schmetterling,

John Gladstone,

Tom Levine,

Charles Homiller,

Rona Schnall,

Mary Barnes,

Ann McGlaughlin,

Disabled in Action of Pennsylvania

Individually and on behalf of all others similarly situated, and

Howard Yerusalim, Individually, and in his official capacity as Secretary of the Pennsylvania Department of Transportation.

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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ELIZABETH KINNEY *et al.*,

Respondents

V.

HOWARD YERUSALIM and
ALEXANDER HOSKINS,

Alexander Hoskins, Petitioner

Petition for Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Alexander Hoskins, Commissioner of the City of Philadelphia Department of Streets, respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit, entered on November 23, 1993, which affirmed the Judgment of the United States District Court for the Eastern District of Pennsylvania entered on February 2, 1993.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit entered November 23, 1993 is reported at 9 F. 3d 1067 (3d cir. 1993). It is reprinted in the appendix hereto, App., Exhibit 1, A. 1.

The decision of the United States District Court for the Eastern District of Pennsylvania (Bartle, J.) entered February 2, 1993 is reported at 812 F. Supp. 547 (E. D. Pa. 1993). It is reprinted in the appendix hereto, App. Exhibit 3, A. 18.

JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction over this case pursuant to 28 U. S. C. §§ 1331, 1343(3) and 1343(4), predicated on an alleged violation of the Americans With Disabilities Act of 1990, 42 U. S. C. § 12101 et seq.

The United States Court of Appeals for the Third Circuit had jurisdiction over the appeal brought by petitioner Hoskins pursuant to 28 U. S. C. § 1291. On November 23, 1993, the Court of Appeals affirmed the judgment of the District Court. No petition for rehearing was sought.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS

42 U. S. C. § 12132. **Discrimination**

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

28 C. F. R § 35.150(a) **Existing Facilities.** *General.*

A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not-

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, A public entity has the burden of proving that compliance with §35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

28 C. F. R § 35.151(e) **New Construction and Alterations.** *Curb Ramps.*

(1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

STATEMENT OF THE CASE

Suit was commenced on July 15, 1992 in the United States District Court for the Eastern District of Pennsylvania. The individual plaintiff-respondents are persons with a variety of physical disabilities which require the use of a wheelchair; plaintiff-respondent Disabled In Action of Pennsylvania, Inc., is a non-profit corporation representing persons with disabilities. Defendant Howard Yerusalim is the Secretary of the Commonwealth of Pennsylvania Department of Transportation.[1] Defendant-petitioner Alexander Hoskins is the Commissioner of the Streets Department of the City of Philadelphia ("City").

Plaintiffs' Amended Complaint sought injunctive relief under 42 U.S.C. § 1983 for alleged violations of the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 et seq. In essence, plaintiffs claimed that Section 202 of the ADA (42 U.S.C. § 12132, and the regulations issued pursuant to ADA by the Department of Justice ("DOJ"), require that curb cuts or ramps for the handicapped be installed whenever the City resurfaces a street.[2]

The essential evidence developed during discovery consisted for the most part of deposition testimony of

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1. Following the close of discovery, a settlement was reached between plaintiffs and defendant Yerusalim, and a Stipulation of Settlement was filed and approved by the District Court on December 1, 1992.

2. Throughout this Petition for Certiorari, the terms "curb cuts" and "curb ramps" are used interchangeably, as they were in the courts below.

officials of the Streets Department of the City of Philadelphia. There are approximately 2,400 miles of streets, roads and highways within the City of Philadelphia. In 1990, approximately 6.6 million dollars was expended for resurfacing of Philadelphia streets, which included work performed by the City's own employees and work performed by outside contractors.

In Philadelphia, streets typically consist of an asphalt upper layer on top of a concrete base. Street resurfacing is always considered maintenance, whether it is extensive or whether it is minor. However, resurfacing can include a variety of different types of work. It can affect different parts of the street structure and can consist of several distinctly different operations.

On some occasions resurfacing may involve nothing more than applying a new layer of blacktop over the existing road, without removal of any of the old asphalt ("repaving"). On other occasions, the existing surface is "milled" prior to repaving. This involves removal of the existing surface asphalt by grinding two to two and a half inches of asphalt from the old surface of the road.(A. 25-26). Whether or not milling is required is dictated by the need to ensure proper drainage for the street surface. Although repaving which does not require milling is often performed by the City's own employees, milling operations are never performed by the City for the simple reason that the City does not own the heavy machinery needed for this operation. Milling can be performed either across the entire width of a street, or else only along the middle of the street seven feet from the curb on either side.(A. 26). Neither milling nor simple repaving disturbs the curbs or sidewalks.

In contrast to milling or repaving, the term "reconstruction" encompasses far more extensive work. Essentially, reconstruction means removing the stone or concrete sub base of the street. The concrete base is broken out with entirely different equipment than that

used in milling. Whenever reconstruction affects the curbs, curb cuts are installed.

Finally, certain City contracts which include street resurfacing are categorized as "improvement" contracts. Such contracts may include areas of the roadway that will be reconstructed as well as others that will be resurfaced. Improvement contracts may also involve work on underground water mains or widening of the street.

On February 2, 1993 the District Court granted plaintiff-respndents' Motion for Summary Judgment and denied defendant-petitioner Hoskins' Motion for Summary Judgment. The District Court held that the dispositive regulation was 28 C.F.R. § 35.151(e)(1) (1983), which requires installation of curb cuts whenever a street is "altered." Under this regulation, the fact that most City resurfacing does not actually disturb the curb or sidewalk was immaterial.

With regard to the crucial question whether resurfacing is an alteration within the meaning of 28 C.F.R. § 35.151(e)(1), the District Court recognized that neither ADA nor any of the regulations issued pursuant to ADA expressly define the term "alteration." However, the court relied on 28 C.F.R. § 35.151(b), which states that when a facility is altered in a manner which "affects or could affect the usability of a facility," the altered portion shall be made accessible.(A. 25). Moreover, the District Court said, the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG"), which were adopted by the DOJ as technical standards for compliance with ADA, define "alteration" as "a change . . . that affects or could affect the usability of the building or facility or part thereof." (A. 23, 25). The District Court found as a matter of law that street resurfacing is an alteration which affects usability, and therefore 28 C.F.R. § 35.151(e)(1) always requires the installation of curb ramps. (A. 25). The Court drew no distinction whatever among the various ways in which resurfacing could be

accomplished, or the various reasons why it might be done.

Significantly, the District Court found that "the City installs curb ramps or slopes whenever work is performed on the curb and plans eventually to install ramps or slopes throughout the City, as required by the "existing facilities" provisions of Title II." (A. 22).

The District Court rejected the City's contention that even if resurfacing constitutes an alteration and therefore requires installation of curb cuts, the City was nonetheless entitled to defend on the basis that the curb cut requirement might impose an undue financial or administrative burden.(A. 26). Essentially, the court found that the undue burden defense was foreclosed by the structure of the DOJ regulations, which only permits that defense under 28 C.F.R. § 35.150, dealing with existing facilities. The regulations make no provision for an undue burden defense in the context of new construction and alterations of facilities, which are covered under 28 C.F.R. § 35.151. The court reasoned that because the present case arises under the "new construction and alterations" section of the regulations, no undue burden defense is available.

By order and opinion issued November 23, 1993, the Third Circuit Court of Appeals affirmed the decision of the District Court. The Third Circuit agreed with the District Court that the term alteration" should be defined in terms of usability, and held that resurfacing of city streets was an alteration within the meaning of 28 C.F.R. 35.151(b) and 28 C.F.R. 35.151(e)(1) because it amounts to a change which affects the usability of the street.(A. 3). The Court of Appeals also determined that the "undue burden" defense which Petitioner Hoskins had asserted only applied to existing facilities and programs, and was not available in the context of alterations. (A. 15).

ARGUMENT

At the center of this dispute is the question of whether resurfacing a street always, sometimes, or never constitutes an alteration within the meaning of the ADA regulation which requires that curb cuts for the handicapped be installed whenever a street is altered. The question is both important and novel. The City of Philadelphia has approximately 2400 miles of streets within its jurisdiction, and spent approximately $6.6 million in street resurfacing operations in 1990 alone. No other court has addressed the issues presented in this case.

The District Court and the Court of Appeals held that resurfacing, no matter how or why it is performed, always amounts to an alteration of a street, and therefore always requires that curb cuts be made at the time the resurfacing is done. The courts below also held that the City was not entitled to assert as a defense the financial burden which mandatory installation of curb cuts entails. These holdings are unreasonable and therefore contrary to the decisions of this Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) and *Alexander v. Choate*, 469 U.S. 287 (1985). Moreover, the record plainly demonstrates that questions of fact existed in the District Court concerning the extent and nature of the work involved in various types of street resurfacing. Given the existence of these questions, summary judgment was inappropriate.

Certiorari should be granted because the Court of Appeals' decision represents an incorrect interpretation of an important federal statute which has not previously been interpreted by this Court and involves a substantial amount of municipal taxpayer funds. *American Federation of Musicians v. Wittstein*, 379 U. S. 171, 175 (1965); *Alaska v. American Can Co.*, 358 U. S. 224, 225 (1959).

I. THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN HOLDING THAT RESURFACING CONSTITUTES AN ALTERATION WITHIN THE MEANING OF 28 CFR § 35.151(e). THIS HOLDING IS UNREASONABLE AND THEREFORE INCONSISTENT WITH THE ADA. MOREOVER, IT IS NOT COMPELLED BY THE REGULATIONS ISSUED BY THE DEPARTMENT OF JUSTICE PURSUANT TO ADA.

Title II of the ADA broadly defines the obligations of public entities, including local governments such as the City of Philadelphia. Section 202 of the Act, 42 U.S.C. § 12132, states:

> "Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

The Act itself does not define the obligations of public entities under this section in any greater detail. Rather, it directs the Department of Justice ("DOJ") to promulgate regulations consistent with the Anti-Discrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Rehabilitation Act), and the regulations previously promulgated thereunder by the DOJ. 42 U.S.C. § 12134.

The DOJ regulations interpreting Title II draw a general distinction between existing facilities on the one hand (28 C.F.R. § 35.150), and new construction and alterations on the other (28 C.F.R. § 35.151). With respect to existing facilities, 28 C.F.R. §35.150 (a) mandates that a public entity shall operate each service, program or activity so that, when viewed in its entirety, it is "readily accessible to and usable by individuals with disabilities. . ." 28 C.F.R. §§ 35.150(c) and 35.150(d) require that any public entity having responsibility over streets develop a transition plan which must include a

schedule for providing curb cuts, and must give priority to walkways which serve certain specified facilities including state and local government offices, transportation facilities and places of public accommodation. All such changes must be made before January 26, 1995. 28 C.F.R. § 35.150(c). Taken together, these sections require that all city streets have curb cuts installed by January 26, 1995, subject only to the defense that such construction may entail undue financial burden. The City of Philadelphia's compliance with these requirements is not at issue in this case.

With respect to new construction and alterations, the relevant requirements for public entities such as the City of Philadelphia are set forth in 28 C.F.R. § 35.151. 28 C.F.R. § 35.151(a) and (b) state:

> (a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.
>
> (b) Alteration. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities if the alteration was commenced after January 26, 1992.

28 C.F.R. § 35.151(a) and (b).

28 C.F.R. § 35.151(e) specifically requires the installation of curb ramps:

> (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.
>
> (2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

28 C.F.R. § 35.151(e).

There is no dispute that 28 C.F.R. § 35.151(e)(1) on its face requires that curb ramps be installed when a street is altered. However, the critical question of whether street resurfacing constitutes an alteration is not answered by any of the regulations issued pursuant to the ADA.

The District Court and the Court of Appeals did not interpret the term "alteration" by analyzing the practical implementation and effect of § 35.151(e)(1), but instead referred to other more general sections of the regulations. In the present case, this was a serious interpretative error, because 28 C.F.R. § 35.151(e)(1) does not fit neatly with either the regulations dealing with alterations and new construction (28 C.F.R. § 35.150), or with those dealing with existing facilities (28 C.F.R. § 35.151).In reality, § 35.151(e)(1) concerns a special situation where work is performed only on the street, but not on the adjacent curb.

Crucial to the decisions of the District Court and the Court of Appeals was 28 C.F.R. § 35.151(b), which states that when a facility is altered in a manner which "affects or could affect the usability of a facility," the altered portion shall be made accessible. On its face, this section applies only to those portions of a facility which are actually altered, and thus is inapplicable to the present case. It is undisputed that the type of street resurfacing at issue in this suit does not involve any work on the

curbs or sidewalks.[3] The courts below recognized that the specific provisions of § 35.151(e)(1) governed this case rather than the more general provisions of § 35.151(b), but nonetheless relied on the usability concept of §35.151(b) to interpret the word "alteration". This is erroneous because § 35.151(e)(1) deals with a particular combination of operations where one facility or portion thereof (the street surface) is affected, but the adjacent facility (the curb) is not ordinarily touched. The usability of the street is logically irrelevant to an inquiry about whether curb cuts should be installed.

After citing the "affects usability" definition of §35.151(b), the District Court referred to the ADA Accessibility Guidelines (ADAAG), which define "alteration" in terms of "usability":

> "An alteration is a change to a building or facility made by, on behalf of, or for the use of a public accommodation or commercial facility, that affects or could affect the usability of the building or facility or part thereof. Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement of the structural parts or elements, and changes or rearrangement in the plan configuration of walls and full height partitions. Normal maintenance, reroofing, painting or wallpapering, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility."

28 C.F.R. Part 36, Appendix A, § 3.5.

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3. Certainly there are times when street resurfacing projects include work on curbs and sidewalks. When it does, the evidence showed that the City takes the opportunity to install curb cuts. Moreover, when the extent of the work is greater than just milling or resurfacing, for instance when it rises to the level of "reconstruction", curb cuts are installed. So-called "improvement contracts," which are a mixture of different types of work, will only provide for curb cuts if the sidewalks or curbs are included in the contract. The District Court nowhere differentiated among theses various types of contracts and work.

Like the District Court, the Court of Appeals relied on the ADAAG guidelines to support its conclusion that an alteration means a change which affects usability. These guidelines were adopted by the DOJ in 28 C.F.R.§ 35.151(c) to provide the technical specifications which would satisfy compliance with the Act. We submit that reference to the ADAAG for purposes of providing technical and engineering specifications ought not to lead to the automatic and total incorporation of the ADAAG definitions as interpretative rules.

Furthermore, the ADAAG are not the exclusive source of technical specifications for ADA compliance. 28 CFR § 35.151(c) designates the Uniform Federal Accessibility Standards ("UFAS") as an alternative set of specifications for assessing compliance with the ADA and the regulations. Conformity with UFAS will be deemed to be compliance with the Act. It is clear that the UFAS definition of alteration is different than that of the ADAAG or of the courts below. The UFAS gives the following definition:

> "Alteration. As applied to a building or structure, means a change or rearrangement in the structural parts or elements, or in the means of egress or in moving from one location or position to another. It does not include normal maintenance, repair, reroofing, interior decoration, or changes to mechanical and electrical systems."

Appendix A to 41 C.F.R. Part 101-19.6.

In Footnote 2 of its Opinion, the District Court dismissed the UFAS definition of alteration on the ground that it only applies to "buildings and structures." But it is far from clear that a street is not a structure under the UFAS, which was intended to be inclusive enough to provide a complete set of guidelines for ADA compliance,

and so logically should be interpreted to include some provision for installation of curb ramps.[4]

We submit that under the UFAS, the definition of alteration would probably not include street resurfacing. It was therefore improper for the lower courts to determine the meaning of the word "alteration" solely by reference to the ADAAG without considering the effect of the parallel UFAS specifications. This is especially true where the UFAS guidelines would not have led the lower courts to the unreasonable result of linking the installation of curb cuts to the resurfacing of streets. And it is clear that such a result is highly unreasonable.

This Court has declared that the interpretation of Section 504 of the Rehabilitation Act, which is the direct analog of section 202 of the ADA, is always subject to the requirement of reasonableness. *Alexander v. Choate*, 469 U.S. 287, 300 (1985). *Southeastern Community College v. Davis*, 442 U.S.397, 412-14 (1979). Thus a recipient of federal financial assistance should not be "required to make "fundamental" or "substantial" modifications to accommodate the handicapped." *Alexander*, 469 U.S. at 300. A recipient may, however, be required to make "reasonable" modifications to accommodate and otherwise qualified handicapped individual.

Here, the holding of the Court of Appeals leads to a patently unreasonable result. There is obviously no sensible reason to link the need to install curb cuts with the need to resurface a street. Curb cuts may be urgently

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4. Section 4.1.6 of the UFAS clearly addresses alteration of facilities, and the preamble to the UFAS states:

> "This document sets standards for facility accessibility by physically handicapped persons for federal and federally funded facilities. These standards are to be applied during the design, construction and alteration of buildings and facilities to the extent required by the Architectural Barriers Act of 1968, as amended."

needed in an area of busy pedestrian use even though there is no need to resurface the street for years to come. Conversely, street resurfacing may be critically necessary in a locale which sees little if any pedestrian use. The need to develop a set of priorities for installing curb cuts, based on a careful assessment of local conditions, is the basis for the requirement that the local government draw up and implement a transition plan. But any rational transition plan is thwarted by the holding of the Court of Appeals, which redirects scarce resources away from areas of serious need and toward areas where there may be no need for curb cuts.

The crucial question is therefore whether the City may continue to adhere to its transition plan, which was itself adopted pursuant to ADA regulations to assure that curb cuts are installed by January 26, 1995 in a way which is consistent with the priorities which local government has found to exist within its jurisdiction. The alternative, which is compelled by the holding of the courts below, is the forced installation of curb cuts whenever a street is resurfaced without regard to the priorities which the transition plan establishes both for the disabled and for the needs of the other citizens of Philadelphia. We submit that the only correct answer is that the City's transition plan, which was established by the City's elected and appointed officials in response to the existing facilities section of the regulations, provides the appropriate timetable for the installation of curb cuts.

II. THIS CASE IS INAPPROPRIATE FOR SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST CONCERNING THE WAY IN WHICH RESURFACING IS DONE.

The evidence in the record was developed in connection with cross-motions for summary judgment, and is not sufficient to support the sweeping conclusion reached by the courts below that street resurfacing always constitutes an alteration within the meaning of 28 C.F.R. § 35.151(e)(1). At a minimum, this case should

have been remanded for trial so that a factual record could be developed to allow proper distinction between different types of resurfacing.

The lower courts' decisions, which make no distinction between the various resurfacing operations but simply hold that all resurfacing requires curb cuts, is inconsistent with any reasonable interpretation of the regulations. The District Court's reference to the legislative history of the ADA argues against the overbreadth of its decision. The report of the House Committee on Education and Labor states:

> "Changes to floors may or may not affect accessibility or usability, depending upon the nature of the change involved. Routine maintenance, repairing and sanding floors, and other minor changes to floor surfaces would generally not affect usability and accessibility...
>
> Other changes to floors, such as totally replacing a floor or installing a brick or stone floor, may be so substantial an undertaking and so connected to usability and accessibility as to trigger the requirement that the altered area be made accessible and that the path of travel and bathrooms be made accessible..."

Quoted in District Court's Opinion at p. 10

The technical compliance specifications, adopted in the DOJ regulations, make it clear that routine maintenance never constitutes an alteration, even when the term "alteration" is read broadly. For instance, the ADAAG definition states:

> "Normal maintenance, reroofing, painting or wallpapering, or changes to mechanical and electrical systems that are not alterations unless they affect the usability of the building or facility." 28 C.F.R. Part 36, Appendix A, § 3.5.

The USAF definition of alteration states: "[Alteration] does not include normal maintenance, repair, reroofing, interior decoration, or changes to mechanical and electrical systems." 41 C.F.R. § 101-19.6, Appendix A, § 3.5.

Thus any court seeking to interpret the curb cut requirement of 28 C.F.R. § 35.151(e)(1) must take account of the different types of resurfacing which are performed and the different circumstances which necessitate street resurfacing. The lower courts failed to take this into account.

By way of example, suppose the City is forced to excavate a street which is in perfect condition in order to gain access to the water, sewer, gas or electric lines beneath it. Upon completion of the utility work the street may be fully or partially resurfaced. Does this mean that curb cuts must be installed? The financial consequences of such a holding would be enormous, yet the courts below never addressed this problem.

Consistent with the Third Circuit's own decision in *Disabled in Action v. Sykes*, 833 F. 2d 1113 (3d Cir. 1987) holding that program accessibility requirements be interpreted reasonably, the relevant question here is to what extent any alterations to a facility provide an opportunity to make the facility more accessible to handicapped persons. 833 F. 2d 1113, 1120-1121. In analyzing whether resurfacing is always the kind of activity which provides an appropriate occasion to install curb cuts, one would have expected the lower courts to examine the type of equipment and personnel utilized in various types of resurfacing operations, and to have compared this with the equipment and personnel needed to install curb cuts. But there was no evidence before the District Court on these points, and the issue is never addressed by the courts below.

We again emphasize that reversal or vacating of the District Court's order will not mean that curb cuts will not be installed. The City will remain obligated to

implement its transition plan in accordance with the program accessibility requirements of Title II by January 26, 1995.

III. THE HOLDING THAT THERE IS NO "UNDUE BURDEN" DEFENSE IS INCORRECT AS A MATTER OF LAW.

28 CFR § 35.150(a), which sets forth the general program accessibility requirements for existing facilities states, in relevant part:

> This paragraph does not ... (3) require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."

The courts below held that the City was not entitled to raise a defense under this section because § 35.150(a) applied only to existing facilities, which the court found to be "separate and distinct" from the provisions governing new construction and alterations. The District Court found this difference in treatment to be logical because:

> "The "existing facility" provisions mandate that public entities make all their services and programs as a whole accessible to the handicapped. The regulations do provide an undue burden defense in recognizing that, in some instances, the requirement to modify existing programs and facilities may impose extraordinary costs on the community. In contrast, new construction and alterations present an immediate opportunity to provide for accessibility."

(A. 26-27).

While expressing some sympathy for the heavy burden this will place on the City's limited resources, the District Court apparently felt that any inquiry into the weight of this burden was foreclosed by the regulations. We submit that this interpretation is nowhere required by the regulations

and is directly contrary to the decisions of this Court which require that the regulations be interpreted reasonably and with a view toward balancing competing interests. *Alexander, supra.*

Even if we assume for purposes of argument that the resurfacing of a street is always an alteration of the street, nevertheless it never amounts to an alteration of the curb. The curb and sidewalk remain at all times existing facilities.

It is precisely for this reason that 28 C.F.R. § 35.151(e)(1) was required. Without this express provision, curb cuts would never have been required by the general program accessibility provisions of section 35.151(b), no matter how extensive the alterations to the street, if the curb or sidewalk was not disturbed, because § 35.151(b) applies only to the facility or portion of a facility which is actually altered.

In reality, §35.151(e) occupies a middle ground between "new construction and alterations" on the one hand, and "existing facilities" on the other. It is exactly this point which refutes the conclusion of the lower courts that there is no undue burden defense available in this case. The simple fact is that although a street may be altered, the sidewalk and curb remain existing facilities at all times. Any fair and reasonable interpretation of the ADA and its regulations will recognize this fact, and permit the undue burden defense to be raised in connection with such existing facilities. To hold otherwise simply because §35.151(e) is placed in the section labelled "new construction and alterations" is a rigid, mechanistic and unreasonable interpretation that requires correction by this Court.

CONCLUSION

For all of the above reasons, Petitioner Hoskins respectfully requests that this Honorable Court issue an order granting a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

MICHAEL F. EICHERT
Divisional Deputy, Appeals
Attorney for Appellant Hoskins

City of Philadelphia
Law Department
1600 Arch Street, Eighth Floor
Phila., PA 19103-1628
(215) 686-5247

Appendix Exhibit 1

Filed November 23, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1168

ELIZABETH KINNEY; GLENN NIMAN; DANIEL C. SULLIVAN; DIANE FATULA; CASSIE JAMES; ERIK VON SCHMETTERLING; JOHN GLADSTONE; TOM LEVINE; CHARLES HOMILLER; RONA SCHNALL; MARY BARNES; ANN MCLAUGHLIN; DISABLED IN ACTION OF PENNSYLVANIA, individually and on behalf of all others similarly situated.

v.

HOWARD YERUSALIM, individually, and in his official capacity as Secretary of the Pennsylvania Department of Transportation; ALEXANDER HOSKINS, individually, and in his official capacity as Commissioner of the Philadelphia Streets Department.

Alexander Hoskins, Commissioner of the Philadelphia Streets Department.

Appellant.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 92-04101)

Argued: September 22, 1993

Before: STAPLETON, ROTH and LEWIS,
Circuit Judges

(Opinion Filed November 23, 1993)

Judith E. Harris
City Solicitor
Michael F. Eichert, Esquire (Argued)
Office of City Solicitor
1600 Arch Street, 8th Floor
Philadelphia, PA 19103-1628
Attorneys for Appellant

George R. Specter
Deputy Solicitor
Gretchen G. Donaldson
Associate Solicitor
Terri J. Imbarlina
Assistant City Solicitor
City of Pittsburgh
Department of Law
313 City County Building
Pittsburgh, PA 15219
Attorneys for Amicus-Appellant
City of Pittsburgh

Stephen F. Gold, Esquire (Argued)
Robin Resnick, Esquire
125 South Ninth Street, Suite 700
Philadelphia, PA 19107
Attorneys for Appellees

Thomas K. Gilhool, Esquire
Frank J. Laski, Esquire
Public Interest Law Center of
Philadelphia
125 South Ninth Street, Suite 700
Philadelphia, PA 19107
Attorneys for Amicus-Appellees
United Cerebral Palsy
Associations, Inc.; Adapt; Eastern
Paralyzed Veterans of America;
Tash; The Association for Persons
with Severe Handicaps;
Pennsylvania Center for Individual
Living

James P. Turner
Acting Assistant Attorney General
Jessica Dunsay Silver, Esquire
Marie K. McElderry, Esquire
(Argued)
United States Department of Justice
Civil Rights Division
P.O. Box 66078
Washington, D.C. 20035-6078
Attorneys for Amicus-Appellee
United States of America

OPINION OF THE COURT

ROTH, *Circuit Judge:*

This appeal requires us to determine whether 28 C.F.R. 35.151(e)(1) (1992). Issued by the Attorney General pursuant to Section 204 of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §12134 (Supp. 1991), requires the City of Philadelphia (the "City") to install curb ramps[1] at intersections when it resurfaces city streets. At issue is whether resurfacing constitutes an "alteration" within the scope of the regulation. The district court held that it does and ordered the City to install curb ramps on those portions of city streets for which resurfacing bids had been taken since January 26, 1992, the effective date of the ADA. On appeal, the City challenges the district court's reading of the term "alteration." Alternatively, it suggests that if resurfacing is, indeed, an alteration. It is entitled to raise an "undue burden" defense under 28 C.F.R. 35.150(a)(3) (1992).

We agree with the district court's interpretation of the regulation and, consequently, we will affirm. Moreover, we agree that the applicability of the "undue burden" defense has been carefully limited to existing facilities and programs. Thus, that defense is not available in the context of alterations.

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1. The terms "Curb Ramps" and "curb cuts" are used interchangeably.

I.

Plaintiffs are Disabled in Action, a non-profit organization, and twelve individuals with ambulatory disabilities who live and work in Philadelphia. In their complaint, plaintiffs sought injunctive relief under 42 U.S.C. §1983 (1988) for alleged violations of the ADA. These allegations were based on the City's practice of installing curb cuts only when work on the city streets otherwise affected the curb or sidewalk or when a complete reconstruction of the street was required.

The lack of curb cuts is a primary obstacle to the smooth integration of those with disabilities into the commerce of daily life. Without curb cuts, people with ambulatory disabilities simply cannot navigate the city; activities that are commonplace to those who are fully ambulatory become frustrating and dangerous endeavors. At present, people using wheelchairs must often make the Hobson's choice between travelling in the streets – with cars and buses and trucks and bicycles – and travelling over uncut curbs which, even when possible, may result in the wheelchair becoming stuck or overturning, with injury to both passenger and chair.

The City of Philadelphia has some 2,400 miles of streets, roads and highways. These streets typically consist of three components: a sub-base of stone, covered by a concrete base, finished with a layer of asphalt. For routine maintenance – patching, pothole repairs, and limited resurfacing – the City maintains a crew of roughly 300 people. For more extensive work, including most resurfacing, bids are solicited from outside contractors.

Resurfacing of the streets is done in a variety of ways, affecting different parts of the street structure. Resurfacing at its simplest is "paving," which consists of placing a new layer of asphalt over the old. In other instances, a more complicated process of "milling" is used to ensure proper drainage or contouring of the road. Milling requires the use of heavy machinery to remove the upper 2 to 3-1/2 inches of asphalt. During an ordinary milling and resurfacing job, cracks in the concrete base may be discovered, and, if so,

repaired. The most extensive form of resurfacing is "reconstruction," which involves removal and replacement of both the asphalt and the concrete or stone layers.

Whatever the extent of work performed under a contract, the City has certain minimum requirements for resurfacing. Thus, by the City's own specification, resurfacing requires laying at least 1-1/2 inches of new asphalt, sealing open joints and cracks, and patching depressions of more than one inch. At issue in this appeal are those resurfacings which cover, at a minimum, an entire street from intersection to intersection. Thus, we are not called up to decide whether minor repairs or maintenance trigger the obligations of accessibility for alterations under the ADA.

At present the City does not include the installation of curb cuts in its milling and resurfacing contracts unless the curb is independently intended to be altered by the scope of the contract. Thus, only those contracts calling for alterations to curbs include curb cuts; contracts for alterations limited to the street surface itself do not.

Plaintiffs brought this class action against Alexander Hoskins, the Commissioner of the Philadelphia Streets Department, and Howard Yerusalim, the Secretary of the Pennsylvania Department of Transportation ("PennDOT"), to compel the installation of curb cuts on all streets resurfaced since the effective date of the ADA.[2] After the parties filed cross-motions for summary judgement, the district court granted plaintiffs' motion, ordering the City to "install curb ramps or slopes on every City street, at any intersection having curbs or other barriers to access, where bids for resurfacing were let after January 26, 1992." *Kinney v. Yerusalim*, 812 F.Supp. 547, 553 (E.D.Pa. 1993). The City brought a timely appeal.

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2. Plaintiffs and defendant Yerusalim entered into a stipulation of settlement, requiring the installation of curb ramps at locations resurfaced by PennDOT since January 26, 1992. The district court approved the agreement. Defendant Yerusalim is not a party to this appeal.

II.

The district court had jurisdiction over this action pursuant to 28 U.S.C. §1331 (1988) and 28 U.S.C. §§1343(3) & (4) (1988). Appellate jurisdiction from a final order of the district court is predicated upon 28 U.S.C. §1291 (1988). The standard of review applicable to a grant of summary judgement is plenary. "On review the appellate court is required to apply the same test the district court should have utilized initially." *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). This court must decide whether a genuine issue of material fact exists and, if not, whether the moving party is entitled to summary judgement as a matter of law. *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361 (3d Cir. 1987).

III.

Title II of the ADA prohibits discrimination in the provision of public services. Section 202 of the Act, 42 U.S.C. §12132 (Supp. 1991), provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Congress' concern with physical barriers is apparent in both the history and the text of the legislation. For example, the findings section of the Act recounts:

> ...
> (2) historically, society has tended to isolate and segregate individuals with disabilities ...;
> (3) discrimination against individuals with disabilities persists in such critical areas as ... transportation ... and access to public services;
> ...
> (5) individuals with disabilities continually encounter various forms of discrimination, including ... the

> discriminatory effects of architectural, transportation and communication barriers....

42 U.S.C. §12101 (Supp. 1991). These general concerns led to a particular emphasis on the installation of curb cuts. The House Report for the legislation noted that "[t]he employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." H. Rep. No. 485, 101st Cong. 2d Sess. pt.2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 367. As such, "under this title, local and state governments are required to provide curb cuts on public streets." *Id.*

The Act itself does not set forth implementing standards, but rather directs the Attorney General to do so. 42 U.S.C. §12134(a) (Supp. 1991). As guidance, Congress directed that the regulations be consistent both with the ADA and with the coordination regulations issued by the Department of Health, Eduction, and Welfare under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1988), concerning nondiscrimination by recipients of federal financial assistance 42 U.S.C. §12134(b) (1988 & Supp. 1991). These regulations are now codified at 28 C.F.R. pt. 41 (1992). With regard to program accessibility in existing facilities and communications. Congress directed that the regulations be consistent with the Department of Justice's Section 504 regulations by federally conducted activities. *See* 28 C.F.R. pt. 39 (1992).

Following this mandate, the Department of Justice issued regulations maintaining the previously established distinction between existing facilities, which are covered by 28 C.F.R. 35.150 (1992), and new construction and alterations, which are covered by 28 C.F.R. 35.151 (1992). With limited exceptions, the regulations do not require public entities to retrofit existing facilities immediately and completely. Rather, a flexible concept of accessibility is employed, and entities are generally excused from making fundamental alterations to existing programs and bearing undue financial burdens. 28 C.F.R. 35.150(a) & (b) (1992).

In contrast, the regulations concerning new construction and alterations are substantially more stringent. When a public entity independently decides to alter a facility. It "shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.151(b) (1992). This obligation of accessibility for alterations does not allow for non-compliance based upon undue burden.

Consistent with the emphasis on architectural barriers, the installation of curb cuts is specifically given priority in both the "existing facilities" and the "new constructions and alterations" sections of the regulations. Streets are considered existing facilities under the regulations,[3] and, as such, they are subject to the more lenient provisions of §35.150. However, because of the importance attributed to curb cuts, the regulations direct public entities to fashion a transition plan for existing facilities, containing a "schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act." 28 C.F.R. 35.150(d)(2) (1992). These changes must be completed by January 26, 1995. 28 C.F.R. 35.150(c) (1992).

The existence of a transition plan for the installation of curb cuts on existing streets does not, however, negate the City's obligations under §35.151, governing alterations.[4] In addition to the general provision in subpart (b), §35.151 has a second subpart addressed solely to the installation of curb ramps. This subpart provides that when a public entity undertakes to construct new streets or to alter

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3. The regulations define "facility" to include "all or any portion of ... roads, walks, [or] passageways." 28 C.F.R. 35.104 (1992). *See also* 28 C.F.R. pt. 35. app. A (1992).

4. Because a plan for the installation of certain curb cuts is required, the City characterizes this suit as a mere "dispute over timing." Appellant's Reply Brief at 3. The City contends that requiring curb cuts in the course of resurfacing would result in "random, unprioritized and immediate installation" of curb cuts. *Id.* The City would rely on its transition plan, suggesting that it excuses the City from other,

existing ones, it shall take that opportunity to install curb ramps.

> Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

28 C.F.R. 35.151(e) (1992). The City does not dispute the literal requirement that the regulation mandates the installation of curb cuts when the City "alters" a street. The City does, however, protest the notion that the resurfacing of a street constitutes an "alteration."

Subpart (e) does not explicitly define "alteration," either in general or as applied in particular instances. Our focus here is the specific application of the general provision in subpart (b) (alterations to existing facilities) to one subject in subpart (e) (streets). We will look first to subpart (b) for guidance:

> *Alteration.* Each facility or part of a facility *altered* by, on behalf of, or for the use of a public entity *in a manner that affects or could affect the usability* of the facility or part of the facility shall, to the maximum extent

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independent obligations in the regulations: "in the interim only *serious* alterations of a street should trigger the curb cut requirement." *Id.* The City also contends that the ADA and the regulations must allow a local government to set its own priorities as to which streets will have curb cuts installed first.

The City may have a transition plan providing for, at a minimum, curb cuts at certain of its intersections. Nevertheless, we cannot rewrite the plain language of the regulations. The applicable section uses unmodified, mandatory language: "altered streets, roads and highways must contain curb cuts." 28 C.F.R. 35.15(e) (1992). Thus, if, as we find below, a resurfacing is an alteration, curb cuts must be installed no matter what other priorities the transition plan may call for. Furthermore, though the City phrases its compliance as a mutually-exclusive choice, there is no inconsistency between a requirement of a transition plan covering priority areas and a requirement that curb cuts be installed whenever a street is altered. The two provisions complement each other in achieving the ultimate ADA goal of full access for people with disabilities.

> feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

28 C.F.R. 35.151(b) (1992) (emphasis added). In addition, subpart (c) provides that alterations made in conformity with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (the "ADAAG") or with the Uniform Federal Accessibility Standards (the "UFAS") shall be deemed to comply with the requirements of this section. Both guidelines provide technical and engineering specifications. The ADAAG definition of "alteration" is substantially the same as that in the regulation: "a change to a building or facility ... that affects or could affect the usability of the building or facility or part thereof." 28 C.F.R. pt. 36, app. A. It continues: "[n]ormal maintenance ... [is] not [an] alteration[ ] *unless [it] affect[s] the usability of the building or facility.*" *Id.* (emphasis added).

These provisions lead one to the conclusion that an "alteration" within the meaning of the regulations is a change that affects the usability of the facility involved.[5] If we then read the "affects usability" definition into subpart (e), the regulation serves the substantive purpose of requiring equal treatment: if an alteration renders a street more "usable" to those presently using it, such increased utility must also be made fully accessible to the disabled through the installation of curb ramps.

Subpart (e) effectively unifies a street and its curbs for treatment as interdependent facilities. If a street is to be altered to make it more usable for the general public, it must also be made more usable for those with ambulatory disabilities. At the time that the City determines that funds will be expended to alter the street, the City is also required to modify the curbs so that they are no longer a

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5. In its emphasis upon functionality and utility, this definition is consistent with the goals of the ADA – the elimination of architectural barriers that presently preclude those with disabilities from full and equal participation in society.

barrier to the usability of the streets by the disabled. This interpretation helps to implement the legislative vision, for Congress felt that it was discriminatory to the disabled to enhance or improve an existing facility without making it fully accessible to those previously excluded.

Although there is limited analysis of the "alterations" sections of Title II, the discussion of the parallel provision in Title III (addressing public accommodations) is helpful in our analysis here.[6] In the context of Title III, Congress' discussion of "affecting usability" focused on the "primary function" of a facility. "Areas containing primary functions refer to those portions of a place of public accommodations where significant goods, services, facilities, privileges, advantages or accommodations are provided." H. Rep. No. 485, 101st Cong. 2d Sess., pt. 2, at 112 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 395. Changes to the defining of characteristic of a facility – to that which makes the facility desirable to the public – mandate that the facility be made accessible to all. Further, accessibility is generously construed to accommodate a wide range of needs, to ensure that patrons "are able to get to, enter, and use the facility." H. Rep. 485, 101st Cong., 2d Sess., pt. 3, at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 486. For example, "the path of travel[,] ... bathrooms, telephones, and drinking fountains [must be] ... readily accessible to and usable by individuals with disabilities." *Id.* at 394.

Thus, while Congress chose not to mandate full accessibility to existing facilities. It required that subsequent changes to a facility be undertaken in a

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6. Like Title II, Title III bears the distinction between existing and new or altered facilities. Congress intended that the provisions of both titles be read consistently. The House Report states "The Committee intends ... that the forms of discrimination prohibited by [Title II] be identical to those set out in applicable provisions of Titles I and III of this legislation." H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N 267, 367. *See also* H. Rep. No. 485, 101st Cong. 2d Sess., pt. 3, at 51 (1990), *Reprinted in* 1990 U.S.C.C.A.N. 445, 474 ("Title II should be read to incorporate provisions of Titles I and III which are not inconsistent with the regulations implementing Section 504 of the Rehabilitation Act of 1973....").

non-discriminatory manner. The use of such changes must be made available to all. The emphasis on equal treatment is furthered, as well, by an expansive, remedial construction of the term "usability." "Usability should be broadly defined to include renovations which affect the use of a facility, and not simply changes which relate directly to access." H. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 64 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 487.

With this directive, we must now determine whether resurfacing a street affects its usability. Both physically and functionally, a street consists of its surface; from a utilitarian perspective, a street is a two-dimensional, one-plane facility. As intended, a street facilitates smooth, safe, and efficient travel of vehicles and pedestrians – in the language above, this is its "primary function."

As such, we can only agree with the district court that resurfacing a street affects it in ways integral to its purpose. As discussed above, "resurfacing" involves more than minor repairs or maintenance. At a minimum, it requires the laying of a new asphalt bed spanning the length and width of a city block.[7] The work is substantial, with substantial effect. As the district court described in its opinion granting plaintiffs' motion for summary judgement:

> Resurfacing makes driving on and crossing streets easier and safer. It also helps to prevent damage to vehicles and injury to people, and generally promotes commerce and travel. The surface of a street is the part of that street that is "used" by both pedestrians and vehicular traffic. When that surface is improved, the street becomes more usable in a fundamental way.

Kinney, 812 F.Supp. 547, at 551.

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7. The City suggests that disposition on summary judgement was inappropriate because the district court failed to distinguish among the various types of resurfacing (paving, milling, and reconstruction). There is no dispute that some resurfacing jobs are more extensive than others. However, the district court based its decision, as we do here, on that which is common to all, the elements required by the City for any resurfacing. *See supra* p. 3.

Finally, we must consider the City's suggestion that interpretation of the ADA is always subject to a requirement of reasonableness. It is true that reasonableness language appears in the text of §35.151(b): "Each facility or part of a facility altered ... shall, *to the maximum extent feasible*, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities' (emphasis added). The City relies on a prior decision of this court. *Disabled in Action of Pennsylvania v. Sykes*, 833 F.2d 1113 (3d Cir. 1987). Interpreting a Department of Transportation regulation that is similar to 28 C.F.R. 35.151(b).[8] There we stated that the relevant questions were "to what extent any alterations to a facility provide an opportunity to make the facility more accessible to handicapped persons" and "what degree of accessibility ... becomes 'feasible' within the scope of alterations," *Sykes*, 833 F.2d at 1120-21. Because the *Sykes* regulation referred to "accessibility" rather than "usability," with resulting limits on scope and effect, the district court found the case to be inapposite. We need not decide that issue. Were we considering alterations only covered by §35.151(b), the relevance of *Sykes* would be at issue. However, in this case the Attorney General has already determined, in promulgating §35.151(e), that the installation of curb cuts is feasible during the course of alterations to a street. Subpart (e) is a specific application of the general principle contained in subpart (b). Through

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8. The regulation was promulgated to comply with Section 504 of the Rehabilitation Act of 1973, also the predecessor to section 202 of the ADA. The regulation is as follows:

> Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient [of Federal financial assistance] ... in a manner that affects or could affect the accessibility of the facility shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

49 C.F.R. 27.67(b)(1981).

its use of mandatory language, the *Sykes* questions have been answered.

IV.

As a final argument, the City contends that, even if resurfacing is an "alteration" requiring the installation of curb cuts, it is entitled to assert an "undue burden" defense excusing compliance. There is no general undue burden defense in the ADA. Rather, following the Section 504 regulations for program access in existing facilities, as Congress intended, the ADA regulations provide for the defense only in limited circumstances. For example, §35.150(a)(3), governing "existing facilities," excuses a public entity from taking "any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."

As discussed above, there are logical reasons for the distinction between existing and new or altered facilities. Allowance of an undue burden defense for existing facilities serves as recognition that modification of such facilities may impose extraordinary costs. New construction and alterations, however, present an immediate opportunity to provide full accessibility. Congress recognized the competing social interests at stake: "While the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole." H. Rep. No. 485, 101st Cong. 2d Sess., pt. 3, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473. Balancing these interests, Congress acknowledged the existence of an undue burden defense for existing facilities but clearly warned. "[n]o other limitation should be implied in other areas." *Id.*

The City acknowledges that the defense is not available for alterations. Nonetheless, it makes a last ditch attempt at characterizing a street and its curbs as separate facilities. As such, a curb would remain an existing facility susceptible to the "undue burden" defense even while the

street that it abuts is being altered. As with our discussion of *Sykes* above, the express language of §35.151(e) refutes this reasoning. That section requires the installation of such ramps if a street is altered. When the City decides that funds are available for the alteration of the street, the City must now understand that such a determination is to be made with the awareness that subpart (e) also requires alteration of the curbs. Thus, once the City undertakes to resurface a street, the accompanying curbs are no longer to be considered as existing facilities, subject to the "undue burden" defense of §35.150(a)(3). They are now, pursuant to the language of subpart (e), incorporated with a facility under alteration, pursuant to §35.151, so that the "undue burden" defense is no longer available.

V.

For the foregoing reasons, we find that resurfacing of the city streets is an alteration within the meaning of 28 C.F.R. 35.151(b) which must be accompanied by the installation of curb cuts under 28 C.F.R. 35.151(e). We will affirm the decision of the district court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix Exhibit 2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1168

ELIZABETH KINNEY; GLENN NIMAN; DANIEL C. SULLIVAN; DIANE FATULA; CASSIE JAMES; ERIK VON SCHMETTERLING; JOHN GLADSTONE; TOM LEVINE; CHARLES HOMILLER; RONA SCHNALL; MARY BARNES; ANN MCLAUGHLIN; DISABLED IN ACTION OF PENNSYLVANIA, individually and on behalf of all others similarly situated.

v.

HOWARD YERUSALIM, individually, and in his official capacity as Secretary of the Pennsylvania Department of Transportation; ALEXANDER HOSKINS, individually, and in his official capacity as Commissioner of the Philadelphia Streets Department.

Alexander Hoskins, Commissioner of the Philadelphia Streets Department.

Appellant.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 92-04101)

Present: Stapleton, Roth, and Lewis, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on September 22, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 2, 1993, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/
Clerk

Dated: November 23, 1993.

Certified as a true copy and issued in lieu
of a formal mandate on December 15, 1993
Teste: /s/
Chief Deputy Clerk, United States Court
of Appeals for the Third Circuit

Appendix Exhibit 3

IN THE UNITED STATES COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELIZABETH KINNEY, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
HOWARD YERUSALIM, et al.	:	No. 92-4101

MEMORANDUM

Bartle, J. February 2, 1993

Plaintiffs, disabled individuals who reside and work in Philadelphia, have filed this class action against Howard Yerusalim, Secretary of the Pennsylvania Department of Transportation (PennDOT), and Alexander Hoskins, Commissioner of the Streets Department of the City of Philadelphia ("City"), under the Americans With Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.*[1] Plaintiffs seek to compel the City to install "curb ramps" or "other sloped areas" on all streets which the City has resurfaced since January 26, 1992, the effective date of the ADA. Before the Court are the parties' cross-motions for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.

Rule 56(c) provides for the entry of summary judgment where "the pleadings, dispositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact..." *See, Celotex Corporation v. Catrett*, 477 U.S. 317 (1986).

In 1992, Congress passed the ADA to address the problem of discrimination against persons with disabilities. Specifically, the ADA prohibits discrimination in employment (Title I), in public services and public transportation (Title II), in public accommodations (Title

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1. Plaintiffs and PennDOT have reached a settlement and PennDOT is therefore no longer a party to this action.

III), and in telecommunications (Title IV). Title II of the ADA, 42 U.S.C. §12131 et seq., which is the subject of this dispute, provides:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132. Rather than outline the specific obligations of public entities under this section, the ADA directed the Department of Justice ("DOJ") to promulgate regulations consistent with the anti-discrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (Redevelopment Rehabilitation Act"), and the regulations promulgated thereunder by the DOJ. 42 U.S.C. §12134. The Rehabilitation Act prohibits discrimination against handicapped individuals by any program receiving public funds.

The removal of architectural barriers to the disabled, and particularly the installation of curb ramps or slopes, was a major concern of Congress in passing the ADA. In the ADA's statement of purpose, Congress specifically identified the "discriminatory effects of architectural ... barriers ..." as one of the evils which the ADA was intended to address. 42 U.S.C. §12101. To this end, the DOJ in its regulations established a scheme intended ultimately to create a society providing physical accessibility to persons with disabilities. The regulations under Title II attempt to accomplish this goal by means of a two-tiered process which distinguishes between a public entity's responsibilities concerning "existing facilities" on the one hand, and "new construction or alterations" on the other.

With respect to *existing* facilities, public entities are not required to modify each facility to provide for access by individuals with disabilities, but must operate all programs, services and activities in a manner such that, when viewed in its entirety, each service or program is "readily accessible to and usable by individuals and

disabilities ..." 28 C.F.R. §35.150(a). Furthermore, this section provides an undue burden defense, stating that a public entity is not required "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. §35.150(a)(3).

Although public entities may comply with the program accessibility requirements for existing facilities in several ways, the regulations specifically mandate the installation of curb ramps. The ADA regulations provide that "if a public entity has responsibility or authority over streets, roads or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act ..." 28 C.F.R. §35.150(d)(2). All such changes to facilities must be made within three years of January 26, 1992. 28 C.F.R. §35.150(d).

In contrast, the regulations are more demanding with respect to new construction and alterations. They require that when the entity undertakes to engage in new construction or to make alterations to existing facilities it must take that opportunity to make its facilities accessible. 28 C.F.R. §35.151 states:

> (a) *Design and construction.* Each facility or part of a facility constructed by, or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.
>
> (b) *Alterations.* Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be

> altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities if the alteration was commenced after January 26, 1992.

Furthermore, this section also specifically requires the installation of curb ramps:

> (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.
>
> (2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

28 C.F.R. §35.151(a). Plaintiffs contend that resurfacing a street constitutes an "alteration" under this provision and that the City is therefore obligated to provide curb ramps or slopes on all streets which have been resurfaced since the effective date of the statute, January 26, 1992.

The regulations' special emphasis on the installation of curb ramps is not hard to understand. Without curb ramps or slopes, it is extremely difficult, if not dangerous, for persons in wheelchairs and other persons with disabilities to perform the essential task of crossing the street. Because the wheels of wheelchairs are sensitive to obstacles, curbs without ramps or slopes present the danger that the chair will overturn, injuring the occupant. Consequently, disabled persons are sometimes obligated to navigate their chairs in the street, exposed to the peril of traffic. Without the ability to cross streets, the opportunities afforded by the ADA are of little benefit. The disabled are severely limited in their ability to obtain employment and recreation and otherwise to participate fully in society. As the House Report explained, "[t]he employment, transportation, and public accommodation sections of [the ADA] would be meaningless if people who use wheelchairs were not afforded the opportunity to travel

on and between the streets." H. Rep. 485(II), 101st Cong., 2d Sess. 84 (1990).

The City does not dispute the importance of installing curb ramps. The City installs ramps or slopes whenever work is performed on the curb and plans eventually to install ramps or slopes throughout the city, as required by the "existing facilities" provisions of Title II. The City contends, however, that merely resurfacing a street is not an "alteration" which triggers the application of 28 C.F.R. §35.151(e), and therefore resurfacing a street does not require the installation of curb ramps or slopes.

The City first asserts that the obligations under the "alterations" section of the regulations apply only to the altered portion of the facility. In other words, because resurfacing affects only the street, it does not trigger an obligation to alter the curb. In support of this argument, defendant point[s] sic to 28 C.F.R. §35.151(b) which provides that alterations must be performed in a manner such that "*the altered portion* of the facility is readily accessible to and usable by individuals with disabilities ..." (emphasis added). Nonetheless, section 35.151(e)(1) specifically provides that "[n]ewly constructed or altered *streets* ... must contain curb ramps" (emphasis added). This more specific regulation supersedes the more general provision of §35.151(b)(1). According to Webster's Third New International Dictionary, to alter something is "to cause something to become different in particular characteristic (as measure, dimension, course, arrangement or inclination) without changing it to something else." The regulations enacted pursuant to Title II of the ADA do not define the term "alteration" except to state that when a facility is altered in a manner which "affects or could affect the usability of a facility," the altered portion shall be made accessible. 28 C.F.R. §35.151(b). The Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG"), which was adopted by the DOJ as a standard for compliance with the accessibility requirements of the

ADA, also defines "alteration" in terms of affecting usability:

> an alteration is a change to a building or facility made by, on behalf of, or for the use of a public accommodation or commercial facility, *that affects or could affect the usability of the building or facility* or part thereof. Alterations include, but are not limited to, remodeling, renovation rehabilitation, reconstruction, historic restoration, changes or rearrangement of the structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, rercofing, painting or wallpapering, or changes to mechanical and electrical systems *are not alterations* unless they affect the usability of the building or facility.

28 C.F.R. Pt. 36, App. A (emphasis added).[2]

Plaintiffs rely on *Disabled In Action v. Sykes*, 833 F.2d 1113 (3d Cir. 1987), *cert. denied* 485 U.S. 989 (1988), for the proposition that the relevant question in determining what constitutes an alteration should be "to what extent any alterations to a facility provide an opportunity to make the facility more accessible to handicapped persons." *Sykes*, at 1120. *Sykes* construed a similar, but not identical regulation promulgated by the Department of Transportation ("DOT") under the Rehabilitation Act which defines an alteration as a change which "affect[s] the *accessibility* of the facility." 49 C.F.R. §27.65(a) (emphasis added). Plaintiffs read the *Sykes* case to hold that unless the alteration itself affords an opportunity to provide for accessibility, no requirement is triggered. In the present

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2. The regulations also adopt the Uniform Federal Accessibility Standards ("UFAS"), Appendix A to 41 C.F.R. §101-19.602(b), as alternate standards by which entities may comply with the accessibility requirements of the ADA. The UFAS definition of "alteration" however is expressly made applicable only to "buildings and structures" and is thus not relevant to this inquiry.

case, however, the express language of the applicable regulations and the analysis by the DOJ call for a different interpretation. The regulations under Title II provide that the accessibility requirements are triggered whenever an alteration "affects or could affect the *usability* of a facility." 28 C.F.R. §35.151(b) (emphasis added). This differs from the regulations in *Sykes* which applied to alterations which affected the *accessibility* of the facility. In its analysis of an almost identical provision under Title III of the ADA,[3] the DOJ made clear that the concept of "usability" should "be read broadly to include any change that affects the usability of the facility, not simply changes that relate directly to access by individuals with disabilities." 28 C.F.R. Pt. 36, App. B. Furthermore, as explained above, the express language of the regulation at issue, which provides for the installation of curb ramps whenever the *street* is altered, precludes an interpretation that only the alteration itself must be made accessible.

The legislative history of the ADA provides some examples of changes which would "affect usability" under Title III. The report of the House Committee on Education and Labor states:

> [t]hat such alterations must or could affect usability means that minor changes such as painting or papering walls, replacing ceiling tiles, and similar alterations that do not affect usability or access do not trigger the requirement that the altered areas must be made accessible

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3. The DOJ provided only minimal analysis of the "alterations" sections of the Title II regulations. However, its analysis of the almost identical provisions under Title III is applicable here. The legislative history suggests that the Title II provisions should be read consistently with the Title III provisions. The House Report states "The Committee intends ... that the forms of discrimination prohibited by [Title II] be identical to those set out in applicable provisions of Titles I and III of this legislation" H. Rep. 485(II), 101st Cong. 2d Sess. 84 (1990), and further, "Title II should be read to incorporate provisions of Titles I and III which are not inconsistent with the regulations implementing Section 504 of the Rehabilitation Act of 1973 ..." H. Rep. 485(III) 101st Cong. 2d Sess. 51 (1990).

> or that the path of travel and bathrooms and other facilities must be made accessible.
>
> Changes to floors may or may not affect accessibility or usability, depending upon the nature of the change involved. Routine maintenance, repairing and sanding floors, and other minor changes to floor surfaces would generally not affect usability and accessibility ...
>
> Other changes to floors, such as totally replacing a floor or installing a brick or stone floor, may be so substantial an undertaking and so connected to usability and accessibility as to trigger the requirement that the altered area be made accessible and that the path of travel and bathrooms be made accessible....

H. Rep. 485(II), 101st Cong., 2d Sess. 111-112 (1990).

Whether resurfacing a street constitutes an "alteration" is thus dependent on whether resurfacing affects the usability of the street. We think that it does. As stated above, the DOJ has indicated that the concept of usability should be read broadly. The ADA is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society. As a remedial statute it must be broadly construed to effectuate its purposes. *Tcherepnin v. Knight*, 389 U.S. 332, 88 S. Ct. 548, 553, (1967). Unlike merely painting a wall or polishing a floor, resurfacing affects the street in ways integral to its purpose. Resurfacing makes driving on and crossing streets easier and safer. It also helps to prevent damage to vehicles and injury to people, and generally promotes commerce and travel. The surface of a street is the part of the street that is "used" by both pedestrian and vehicular traffic. When that surface is improved, the street becomes more usable in a fundamental way.

Furthermore, the process of resurfacing entails more than minor repair work or maintenance. According to the parties, City streets generally consist of three layers, a sub-base consisting of stone, a base consisting of concrete, and a top layer of asphalt. While sometimes new asphalt

may simply be overlaid on top of the old surface, more often the old asphalt is removed by a process known as "milling." Milling consists of removing and then replacing the top layer of asphalt with the use of heavy machinery. This process may require either that the entire surface from curb to curb be removed, or that seven or eight feet from either curb may be removed, depending on the nature of the street. During this process any necessary reconstruction will be performed, for example any cracks in the concrete base of the road will be repaired and manholes may be raised or lowered to be flush with the street when the resurfacing is complete. We conclude that resurfacing a street is an alteration within the meaning of the regulations and triggers the obligation to install curb ramps or slopes.

The City contends that if resurfacing is an "alteration" it is entitled to assert an "undue burden" defense to the requirement of installing curb ramps. The City relies on §35.150(3) which provides that a public entity is not required "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." This provision, however, is found under the section of the regulations governing "*existing facilities*," 28 C.F.R. §35.150. It is separate and distinct from the provisions governing "new construction and alterations" under 28 C.F.R. §35.151. There simply is no general "undue burden" defense in the ADA. It is provided only in limited circumstances. For example, Title III of the ADA specifically provides that an entity is excused from the "path of travel" requirements if the cost of compliance would be disproportionate to the cost of the alteration. 28 C.F.R. §36.403. However, the general "alterations" provisions of Title III contain no such defense.

The distinction between the requirements under the "existing facilities" and "alterations" provisions is logical. The "existing facilities" provisions mandate that public entities make all their services and programs as a whole accessible to the handicapped. The regulations do provide

an undue burden defense in recognizing that, in some instances, the requirement to modify existing programs and facilities may impose extraordinary costs on the community. In contrast, new construction and alterations present an immediate opportunity to provide for accessibility. We can only conclude that Congress and the DOJ made the determination that when a public entity decides to engage in new construction or to make alterations, it is not an undue burden to require it to provide for accessibility at that time. Congress realized that these requirements might pose difficulties for financially strapped state and local governments, but determined that the overall long term benefit to society outweighed the costs. The House Judiciary Committee explained:

> While integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole. The general prohibitions set forth in the Section 504 regulations are applicable to all programs and activities in Title II. The specific sections on employment and program access *in existing facilities are subject to the 'undue hardship and undue burden' provisions of the regulations which are incorporated in Section 204. No other limitations should be implied in other areas.*

H. Rep. 485(iii), 101st Cong., 2d Sess. 50 (1990) (emphasis added).[4]

Finally, we must determine whether the City is obligated to install curb ramps on all streets on which the resurfacing was performed after January 26, 1992, the effective date of the statute, or on only those streets which

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4. We should note that the Court is aware of the heavy burden this will place on the City's limited resources. It is unfortunate that Congress, in enacting this type of legislation, often fails to provide the means of financing the obligations it imposes.

were "bid" after that date. 28 U.S.C. §35.151 provides that the requirements of that section apply to construction and alterations which were commenced after January 26, 1992. However, the DOJ's analysis of this section provides, "[f]acilities under design on that date will be governed by this section if the date that bids were invited falls after the effective date." 28 C.F.R. Pt. 35, App. A. Plaintiffs contend that the DOJ analysis is inapplicable, because the installation of curb ramps requires no actual "design." They assert that the standards and specifications for curb ramps and slopes are detailed in the UFAS and ADAAG guidelines which are incorporated in the regulations and that the City uses a specific design for curb ramps which is pre-set. This interpretation of the term "design" is unduly restrictive. We do not construe the term "design" to mean only the drawing up of technical specification. Street resurfacing can require significant planning by the City, including the procurement of funds and the solicitation of bids. Such advance planning and preparation amounts to "design." We conclude that the obligations imposed by 28 C.F.R. §35.151 apply only to those contracts for which bids were let after January 26, 1992.

The plaintiffs' motion for summary judgment will be granted and the defendant will be ordered to install curb ramps or slopes on every City street, at any intersection having curbs or other barriers to access, where bids for resurfacing were let after January 26, 1992. The defendant's motion for summary judgment will be denied.

Appendix Exhibit 4

IN THE UNITED STATES COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELIZABETH KINNEY, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
HOWARD YERUSALIM, et al.	:	No. 92-4101

ORDER

AND NOW, this 2nd day of February, 1993, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the Motion of plaintiffs for Summary Judgment is GRANTED and that the Motion of defendant, Alexander Hoskins, Commissioner of the Philadelphia Streets Department, for Summary Judgment is DENIED.

It is further ORDERED that defendant shall install curb ramps or slopes on every City street, at any intersection having curbs or other barriers to access, where bids for resurfacing were let after January 26, 1992.

BY THE COURT:

/s/

J.

(2)

93-1439

No. _____

In The

Supreme Court Of The United States

October Term, 1993

HOWARD YERUSALIM, *et al.*,

ALEXANDER HOSKINS, *Petitioner,*

v.

ELIZABETH KINNEY, *et al.*,

Respondents.

RESPONDENTS' ELIZABETH KINNEY, *et al.*, BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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***Stephen F. Gold**
Robin Resnick
125 South Ninth Street, Suite 700
Philadelphia, PA 19107
(215) 627-7100
Attorneys for Respondents

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*Counsel of record.

25 pp

QUESTIONS PRESENTED

1. Did the lower courts correctly hold that a Department of Justice regulation, 28 C.F.R. §35.151(e)(1), validly promulgated pursuant to the Americans With Disabilities Act, requires Petitioner to build curb ramps if, and only if, it resurfaces streets?

2. Did the lower courts correctly hold that Petitioner could not invoke an "undue burden" defense to avoid building curb ramps when it voluntarily chooses to resurface streets?

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NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1993

HOWARD YERUSALIM, et al.,

ALEXANDER HOSKINS, Petitioner,

v.

ELIZABETH KINNEY, et al.,

Respondents.

RESPONDENTS' ELIZABETH KINNEY, et al., BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

Respondents Elizabeth Kinney, et al. respectfully request that the Court deny the petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 9 F.3d 1067 (3d Cir. 1993). Pet. App. at A-1.[1] The opinion of the District Court is reported at 812 F.Supp. 547 (E.D. Pa. 1993). Pet. App. at A-18.

STATEMENT OF THE CASE

Elizabeth Kinney and eleven other persons with ambulatory disabilities and Disabled In Action of Pennsylvania, a non-profit organization comprised of persons with disabilities, sought declaratory and injunctive relief against Howard Yerusalim, Secretary of the Pennsylvania Department of Transportation,[2] and Petitioner Alexander Hoskins, Commissioner of the City of Philadelphia Streets Department, for violating the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq., to require them to build curb ramps when they resurface certain streets. In the District Court, Plaintiffs and Defendant Hoskins filed cross-motions for

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[1]The designations "Pet. Br." and "Pet. App." refer, respectively, to the Brief and Appendix to the Petition for a Writ of Certiorari and "C.A. App." refers to the Appendix filed in the Court of Appeals.

[2]Pursuant to a Stipulation, Defendant Yerusalim agreed to build curb ramps at those streets in Philadelphia that PennDOT resurfaces. This Stipulation, by its terms, remains in effect unless the Supreme Court reverses the Third Circuit's decision.

summary judgment. The District Court granted Plaintiffs' motion, and the Court of Appeals unanimously affirmed.

Curb cuts[3] are critical to the everyday lives of persons who use wheelchairs, walkers, or crutches.[4] Street intersections without curb cuts present virtually insurmountable obstacles to commonplace activities. Writing for the Court of Appeals, Judge Roth stated: "[W]ithout curb cuts, people with ambulatory disabilities simply cannot navigate the city; activities that are commonplace to those who are fully ambulatory become frustrating and dangerous endeavors." Pet. App. at A-4. For example:

- Without curb cuts, people in wheelchairs often are forced to navigate their wheelchairs in the street, dodging cars, trucks and buses.
- The front wheels of a wheelchair are sensitive to obstacles and trying to cross an inaccessible

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[3]In this brief, the terms "curb cuts," "curb ramps," and "other sloped areas" are used interchangeably.

[4]Uncut curbs constitute significant accessibility barriers to a wide range of people with disabilities, whether or not they use mechanical devices to assist them in ambulation, including persons with severe arthritis, muscular dystrophy, multiple sclerosis, cerebral palsy, spina bifida, many forms of cancer, and brittle bone disease.

curb presents a real danger, causing wheelchairs to overturn and their occupants to fall and be injured.

- The excruciating pain associated with some disabilities may be exacerbated when wheelchairs are lifted over inaccessible curbs and the persons are jolted.

- People in wheelchairs are forced to retrace their routes after gaining access to the pavement and then discovering there is no curb ramp at the end of the block.

- In the absence of curb cuts, people with disabilities have difficulty seeking and retaining employment, traveling safely for work or pleasure, and participating in social and cultural activities. C.A. App. at 182-189.

Street alterations include reconstruction and milling projects, but the common denominator of all of the projects is that they involve resurfacing. Whenever a street is reconstructed and/or milled, by necessity it must also be resurfaced. Resurfacing involves work from intersection to intersection. As the Court of Appeals observed, all street reconstruction and milling, based on the City's own specifications, have "certain minimum requirements for resurfacing". Pet. App. 5. These requirements include inter alia, "laying at least 1-1/2 inches of new asphalt, sealing open joints and cracks, and patching depressions of more than one inch." Id. In addition, all resurfacing also includes

installing bituminous material on all vertical surfaces of curbs and gutters. There are different types of paving material used in all resurfacing jobs, depending on the desired skid resistance, wearability and appearance. C.A. App. 128-132.

Resurfacing involves much more than normal maintenance or minor repairs. While City employees repair potholes, small patching, and other minor street repairs, "resurfacing" is performed for the most part by private contractors. Plaintiffs do not contend --and the lower courts did not hold -- that minor repairs or maintenance trigger the City's obligation under the Americans With Disabilities Act to install curb ramps; rather, they assert, and the lower courts held, only that the City must install curb ramps when it chooses to resurface entire streets. As the Court of Appeals explained: "[A]t issue in this appeal are those resurfacings which cover, at a minimum, an entire street from intersection to intersection. Thus, we are not called upon to decide whether minor repairs or maintenance trigger the obligations of accessibility for alterations under the ADA." Pet. App. at A-5.

On the basis of these facts, both the trial and appellate courts held that Petitioner violated 28 C.F.R. § 35.151(e)(1). This regulation, the courts concluded, requires Petitioner to install curb cuts on those streets they choose to resurface, so that persons with ambulatory disabilities can have access to streets equal to persons without disabilities.

ARGUMENT

Cutting through the verbiage, Petitioner seeks certiorari for two unpersuasive reasons. First, he desires that this Court factually re-examine whether street resurfacing "always, sometimes, or never," Pet. Br. at 8, constitutes an "alteration" under 28 C.F.R. § 35.151(e)(1). It is not the role of this Court to make such factual assessments. Moreover, the District Court and the Court of Appeals both correctly determined that intersection-to-intersection resurfacing is an alteration, regardless of whether more extensive work (such as milling or complete reconstruction) is performed.

Second, Petitioner seeks to challenge 28 C.F.R. § 35.151(e)(1), a validly promulgated regulation. Petitioner asserts that the linkage of streets and curbs, endorsed by both lower courts, is "unreasonable". Pet. Br. at 14. This argument defies the express language of the regulation. Similarly, Petitioner's argument that an undue burden defense should be permitted is based on its unwillingness to recognize the regulation's link between streets and curbs. Thus, Petitioner is, in reality, attacking the validity of the regulation. Petitioner never argued in the courts below that DOJ exceeded its authority in promulgating this regulation, and it cannot be heard to do so now.

There is no cogent reason to grant certiorari. The Third Circuit's decision is not in conflict with any

decision of this Court or any other appellate court (or even any district court). Indeed, the Third Circuit's decision is the only appellate decision to date which has interpreted the Americans with Disabilities Act, and the only decision in any court regarding the duty of a public entity to construct curb ramps. Moreover, the Third Circuit's decision is supported by the Department of Justice ("DOJ"), which promulgated the regulation at issue. The DOJ filed an amicus brief and participated in oral argument in the Court of Appeals supporting the District Court's construction of 28 C.F.R. § 35.151(e)(1). An agency's interpretation of its own regulation must be given "controlling weight unless it is plainly erroneous . . ." Stinson v. United States, 113 S. Ct. 1913, 1919 (1993).

REASONS FOR DENYING CERTIORARI

I. The Lower Courts' Conclusion That Resurfacing Constitutes an Alteration Is Not Inconsistent With Any Decision of This Court or Any Other Appellate Court nor Does It Raise Any Important Legal Question Which Necessitates Resolution By This Court.

Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, prohibits discrimination by public entities against individuals with disabilities. 42 U.S.C. § 12132. Congress delegated broad authority to the DOJ to promulgate regulations implementing Title II. 42 U.S.C. § 12134. The DOJ's

validly promulgated regulations draw a sharp distinction between "new construction and alterations" and "existing facilities." Compare 28 C.F.R. § 35.151 (new construction and alterations) with 28 C.F.R. § 35.150 (existing facilities). Included in the former regulation is the subpart at issue here which simply states:

> Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

28 C.F.R. § 35.151(e)(1).

Petitioner takes issue with the Court of Appeals' conclusion that an "alteration" of a street under 28 C.F.R. § 35.151(e)(1) (which triggers the requirement that a public entity install curb ramps) is "a change that affects the usability of the facility involved." Pet. App. at A-10. The Third Circuit based this definition on two sources: 28 C.F.R. § 35.151(b) and the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG"), which is referenced in 28 C.F.R. § 35.151(c). Pet. App. at A-9-A-10. Looking to other subparts of Section 35.151 to determine what "alteration" means in the context of

Section 35.151(e)(1) is certainly appropriate.[5] The Court of Appeals then correctly determined that resurfacing, as done by Petitioner, changes the usability of the street and, thus, is an alteration. Pet. App. at A-12.[6]

If resurfacing is an alteration, then 28 C.F.R. § 35.151(e)(1) mandates that Petitioner install curb cuts on those streets which it chooses to resurface. Petitioner, though, asserts that adoption of the Uniform Federal Accessibility Standard ("UFAS")[7] definition

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[5]Contrary to Petitioner's assertion, the Third Circuit did not completely incorporate ADAAG's definitions into the ADA. Pet. Br. at 13. Rather, it simply looked to ADAAG for guidance in identifying an appropriate definition of "alteration."

[6]In his Petition, Petitioner does not assert that resurfacing does not affect the usability of the street.

[7]Petitioner asserts that the Third Circuit should have adopted the definition of "alteration" embodied in UFAS, which is also referenced in 28 C.F.R. §35.151(c). UFAS provides that an "alteration" of a building or structure "means a change or rearrangement in the structural parts or elements." Pet. Br. at 13 (quoting Appendix A to 41 C.F.R. Part 101-19.6). Adoption of the UFAS definition, however, would not lead to a different result than adoption of the "usability" definition embodied in Section 35.151(b) and ADAAG; street resurfacing does change the structural parts of a street by adding or replacing the top layer, and, therefore, would constitute an alteration under UFAS.

"would not have led the lower courts to the unreasonable result of linking the installation of curb cuts to the resurfacing of streets." Pet. Br. at 14. Petitioner then labels this link "unreasonable." Id. However, adoption of the UFAS definition of alteration (rather than the "usability" definition adopted by the Court of Appeals) would not break the link between streets and curbs. It is the DOJ regulation, 28 C.F.R. § 35.151(e)(1), (not the definition of alteration) that "unifies a street and its curbs for treatment as interdependent facilities," as the Court of Appeals determined. Pet. App. at A-10.

In essence, Petitioner's assertion that it is unreasonable to link curb cuts to street alterations, Pet. Br. at 14-15, is an attack on 28 C.F.R. § 35.151(e)(1) itself. Petitioner evidently believes that DOJ should have required the installation of curb ramps only when the curb itself is altered -- not when the street is altered.[8]

Indeed, Petitioner himself only asserts that adoption of this definition would "probably not include street resurfacing." Pet. Br. at 14 (emphasis added).

[8]The ADA regulations require installation of curb ramps when either curbs or streets are altered. 28 C.F.R. § 35.151(e)(1)-(2). Prior to promulgation of these regulations, the federal government required only installation of curb cuts when curbs were constructed. 49 C.F.R. § 27.75; 44 Fed. Reg. 31454 (1979). Petitioner's desire to return to the pre-ADA days cannot be permitted to repeal properly promulgated regulations.

Petitioner's argument, if successful, would effectively repeal a validly promulgated regulation. In fact, Petitioner never asserted in either the District Court or the Third Circuit that the DOJ exceeded its broad statutory authority when it promulgated Section 35.151(e)(1) or that it otherwise violated the law in doing so. Petitioner cannot raise this argument for the first time in this Court.

Substantively, the DOJ's link of curb cuts to street alterations is not unreasonable. The regulation's link between street alterations and curb cuts constitutes a determination by the DOJ that installing curb cuts when streets are altered is reasonable, and it is not for Petitioner or the courts to annul that determination. Pet. App. at A-13. In Southeastern Community College v. Davis, 442 U.S. 397 (1979), and Alexander v. Choate, 469 U.S. 287 (1985), this Court concluded that a public entity may refuse to make an accommodation only if it imposes undue financial and administrative burdens or requires a fundamental or substantial alteration in the nature of the program. See Alexander v. Choate, 469 U.S. at 300; Davis, 442 U.S. at 410. Thus, DOJ has administratively determined that installing curb cuts when a street is altered is a reasonable accommodation since doing so

will not impose undue burdens or fundamentally change programs.[9]

The DOJ's link of curb cuts and street alterations is supported by the ADA's legislative history. Congress intended the ADA to lead to the removal of unnecessary architectural barriers. "The employment, transportation, and public accommodation sanctions of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets .... [U]nder this title, local

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[9]Section 35.151(e)(1) is not the only regulation in which the DOJ has linked two elements. In the DOJ's regulations under Title III of the ADA (governing public accommodations), the DOJ requires:

> An alteration that affects or could affect the usability of or access to an area or facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible and usable by individuals with physical disabilities.

28 C.F.R. § 36.403. For example, if a supermarket alters its checkout counters, it must ensure that the path of travel to these counters is accessible even though it made no alteration to the path itself. Similarly, DOJ requires the path of travel to restrooms, telephones, and drinking fountains must be made accessible even when no alterations are made to them directly.

and state governments are required to provide curb cuts on public streets." H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 84 (1990).

Petitioner's assertion that requiring installation of curb cuts when it alters streets will thwart its transition plan, Pet. Br. at 15 is a red herring that the Third Circuit correctly rejected. Pet. App. at A-8-A-9 n.4. While Petitioner is correct that 28 C.F.R. § 35.150(c) requires the City to build curb cuts by January 26, 1995, at least on streets near government offices, transportation facilities, and places of public accommodation, Pet. Br. at 10, Respondents do not seek enforcement of that sub-part. More importantly, there simply is no conflict between Section 35.150(c)'s requirement that the City have and implement a transition plan for the installation of curb cuts and Section 35.151(e)(1)'s requirement that curb cuts be installed as streets are altered. As the Court of Appeals wrote: "The two provisions complement each other in achieving the ultimate ADA goal of full access for people with disabilities." Pet. App. at A-9 n.4.

Both regulations illustrate the ADA's gradualist approach. Congress sought to balance the costs of eliminating all architectural barriers immediately with the need to create an accessible society. Thus, the DOJ's transition plan regulation, 28 C.F.R. § 35.150(c), requires that only those streets with key facilities (e.g., public accommodations and government buildings) have curb cuts by January 25, 1995.

Similarly, 28 C.F.R. § 35.151(e)(1), the regulation involved here, only requires public entities to install curb cuts when it voluntarily chooses to alter streets.[10] In this way, as a city is gradually resurfaced, it will become accessible to people with disabilities.

Finally, certiorari is not warranted to have this Court examine what Petitioner claims are factual issues precluding summary judgment. Petitioner does not challenge the standard for summary judgment applied by either of the lower courts; he only disputes the application of the standard to the facts. Whether Philadelphia's resurfacing, as compared to other cities' resurfacing, "affects the usability" of the street does not raise an important legal question. Yet, Petitioner wants this Court to review whether the laying of 1½ inches of asphalt (as opposed to perhaps 2 inches or 1 inch that other cities might require) or whether excavating a city street to install a sewer pipe constitute an alteration under 28 C.F.R. § 35.151(e)(1). These factual issues are beyond the realm of this Court.

Substantively, there simply are no factual issues. It does not matter that there are "different types of resurfacing which are performed and the different circumstances which necessitate street resurfacing." Pet. Br. at 17. Regardless of whether the alteration

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[10]Individuals with disabilities cannot compel Petitioner to build curb ramps at specific streets unless he has chosen to resurface those particular streets.

involves reconstruction, street excavation to access water, sewer, or electric lines, milling, or simply applying a new layer of blacktop, the bottom line is that all of these activities require resurfacing. Pet. App. at A-12 n.7. The evidence presented led both lower courts to conclude that intersection-to-intersection resurfacing, as performed by Petitioner in the instant action, is an alteration. Pet. App. at A-12, A-25-A-26. Petitioner is incorrect in his effort to challenge this factual conclusion by asserting that resurfacing is mere "maintenance." Pet. Br. at A-16. As the Third Circuit wrote: "At a minimum, [resurfacing] requires the laying of a new asphalt bed spanning the length and width of a city block. The work is substantial, with substantial effect." Pet. App. at A-12.

II. The Lower Courts' Conclusion that There is No Undue Burden Defense Is Not Inconsistent With Any Decision Of This Court or Any Other Appellate Court Nor Does It Raise Any Important Legal Question Which Necessitates Resolution By This Court.

Both the District Court and the Court of Appeals correctly concluded that when a public entity resurfaces (i.e., alters) a street, it must install a curb ramp regardless of the burden of doing so. Pet. App. at A-14, A-26-A-27. Petitioner's challenge to this conclusion is another thinly-veiled attack on the legitimacy of 28 C.F.R. § 35.151(e)(1).

The DOJ regulations under Title II adopt the historical dichotomy between new construction and alterations on the one hand and existing facilities on the other hand. Compare 28 C.F.R. §§ 39.150, 35.150 (Rehabilitation Act of 1973 and ADA regulations governing existing facilities) with 28 C.F.R. §§ 39.150, 35.151 (Rehabilitation Act of 1973 and ADA regulations governing new construction and alterations). Historically, public entities have been able to assert an "undue burden" defense with respect to regulations concerning retrofitting of existing facilities, but not with respect to making new construction or alterations accessible.

Petitioner does not challenge this dichotomy; he does not contend that an undue burden defense is available with respect to making new construction and alterations accessible. Pet. Br. at 18-19. Rather, Petitioner asserts that 28 C.F.R. § 35.151(e)(1) "occupies a middle ground" between existing facilities and new construction/alterations because the curb and sidewalk are not altered. Pet. Br. at 19. As the Third Circuit determined, however, 28 C.F.R. § 35.151(e)(1) unifies the street and the curb into a single facility, and resurfacing alters that facility. Thus, there is an actual alteration of a facility, and the undue burden defense is not available.

Petitioner's argument depends upon the dissolution of the regulatory link between streets and curbs.

Petitioner states that the lower courts' conclusion is based on "a rigid, mechanistic and unreasonable interpretation that requires correction by the Court." Pet. Br. at 19. Yet, the lower courts' interpretation is drawn directly from the language of the regulation. Petitioner seeks to have this Court move subpart 35.151(e)(1) from the "new construction and alterations" provision, 28 C.F.R. § 35.151, to the regulation governing existing facilities, 28 C.F.R. § 35.150, in order to create an undue burden defense. As discussed above, the lower courts found no justification to second-guess the DOJ's placement of the curb cut regulation in the new construction/alteration section, and Petitioner has not advanced any more persuasive reason to do so in its Petition.

CONCLUSION

Because the instant case presents no important legal questions that would justify review by this Court and there is no conflict among circuits, the petition for writ of certiorari should be denied.

Respectfully submitted,

*STEPHEN F. GOLD
ROBIN RESNICK
Suite 700, 125 S. 9th Street
Philadelphia, PA 19107
(215) 627-7100
Counsel for Respondents

March 18, 1994

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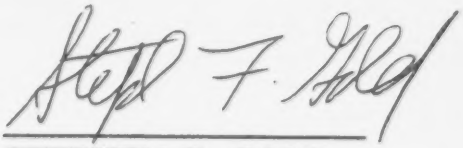
*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief of Respondents in Opposition to the Granting of a Writ of Certiorari were served this 18th day of March, 1994, by U. S. mail, certified, return receipt requested, on petitioner's counsel as follows:

Michael F. Eichert, Esquire
Divisional Deputy City Solicitor
City of Philadelphia Law Department
1600 Arch Street, 8th Floor
Philadelphia, PA 19103-2081



STEPHEN F. GOLD

No. 93-1439

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEXANDER HOSKINS, individually and in his official capacity as the Commissioner of the Philadelphia Streets Department,

Petitioner,

v.

ELIZABETH KINNEY; GLENN NIMAN; DANIEL C. SULLIVAN; DIANE FATULA; CASSIE JAMES; ERIK VON SCHMETTERLING; JOHN GLADSTONE; TOM LEVINE; CHARLES HOMILLER; RONA SCHNALL; MARY BARNES; ANN MCLAUGHLIN; DISABLED IN ACTION OF PENNSYLVANIA, individually and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICUS CURIAE THE UNITED STATES CONFERENCE OF MAYORS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

BETTY SOUTHARD MURPHY
Counsel of Record

JOHN DANIEL REAVES
JOY MARY MACIEJEWSKI
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1500

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IN THE

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ALEXANDER HOSKINS,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF AMICUS CURIAE THE UNITED STATES CONFERENCE OF MAYORS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amicus Curiae, The United States Conference of Mayors, respectfully files this brief, pursuant to Rule 37 of this Court, and with the consent of the parties below, in support of the petition for a writ of certiorari. This case is of exceptional importance because the decision below: (1) implicates traditional notions of federalism and state sovereignty which are subject to constitutional protections, and (2) unduly interferes with the States' ability to function as States

and "commandeers the States to act as agents of the federal government."

INTEREST OF AMICUS CURIAE

The United States Conference of Mayors ("USCM") is a national organization representing hundreds of this nation's civic leaders. "The [USCM] is the official nonpartisan organization of cities with populations of 30,000 or more. There are about 1,050 such cities in the country today." The United States Conference of Mayors, *The Mayors of America's Principal Cities* (1993). The USCM was organized, in part, to provide mayors with a unifying voice in the face of an ever-burgeoning federal government. In its constitution, the USCM has recognized that among "[t]he purpose[s] of this organization . . . shall be . . . the safeguarding of the interests, rights and privileges of municipalities as they may be affected by legislation."

STATEMENT UNDER RULE 29.4(b)

Since the appellate court's decision draws into question the constitutionality of 28 C.F.R. § 35.151(e)(1) (1993), 28 U.S.C. § 2403(a) (1988) may apply. No United States court has, pursuant to 28 U.S.C. § 2403(a), certified this issue to the Attorney General.

REASONS FOR GRANTING THE WRIT

The impact of the Americans with Disabilities Act ("ADA" or the "Act"), as well as other unfunded federal mandates, on this nation's cities and states has been staggering. Since 1980, 27 new mandates have become law. Tom Diemer, "States Take Dim View of D.C.'s Bright Ideas," *The Plain Dealer*, Feb. 6, 1994, at 4A. Many of these mandates are unfunded

. . . and extremely costly. According to a Price Waterhouse study surveying more than 300 of this nation's cities, implementation of 10 selected unfunded federal mandates cost cities more than six and one-half billion dollars last year. Price Waterhouse, *Impact of Unfunded Federal Mandates on U.S. Cities* (the "Price Waterhouse Study") (Oct. 26, 1993), at 2. "Directives from Washington gobble up 12% of county revenues nationwide and nearly the same percentage of city-collected taxes." *See* Diemer, *supra.*

The staggering costs of these mandates have put additional strains on already tight local budgets. As Philadelphia Mayor Ed Rendell recently noted, the cities are currently "being robbed of [their] ability to do the things that are smart and [to] make [their] own priorities." Kevin McCarty, "Rendell Pushes Senate to Adopt Kempthorne-Condit Bill," *U.S. Mayor*, Nov. 15, 1993, at 1. Implementation of the ADA's regulations has had the same impact. Implementation of the ADA regulations cost cities more than $350 million last year. Price Waterhouse Study at 4.

The Congressional mandate requiring the installation of curb ramps has been particularly costly. In the City of Philadelphia, it will cost local taxpayers an estimated $130 million to $140 million to install curb ramps. Matthew Purdy "Rendell and Other Mayors Tell D.C.: Put Up, or Shut Up," *Philadelplhia Inquirer*, Oct. 28, 1993, at B3. Cutting curb ramps will cost an estimated $1,000 to $2,000 per curb; for a six-county area, it will be an overall total of $20 million. Martin Pflieger, "Curbs Are Becoming Handicap Friendly," *The Morning Call*, July 14, 1993, at B3.

Despite this tremendous cost, administrators across the country have indicated their willingness to help the disabled and to implement the ADA's mandates. As one civic leader recently noted with regard to the curb ramp mandate, "[e]veryone wants to comply . . . [b]ut for some this is going to be a very expensive venture . . . [i]t's not that most people don't think it's a good idea, it's just that it can be very costly." Rob Thomas & Steve Ostrowski, "Suburbs Face Challenge, Costs of Satisfying Disabilities Act," *Chi. Trib.*, July 13, 1992, N.W. Sec., at 3. The same sympathies have been espoused by Mayor Rendell, who testified before the Senate Committee on Governmental Affairs that "[e]very American agrees with the goals of ADA—to ensure fair and equal access for the disabled. This is clearly a good unfunded federal mandate, but an illogical interpretation of it will have an extremely damaging effect on Philadelphia." "Unfunded Federal Mandates . . . The Philadelphia Story," *U.S. Mayor*, Nov. 15, 1993, at 12. The courts below have taken an illogical interpretation of the curb ramp mandate.

Plaintiffs below were the not-for-profit organization, Disabled in Action, and twelve individuals with ambulatory disabilities who live and work in Philadelphia. Plaintiffs brought their complaint alleging that pursuant to 28 C.F.R. § 35.151(e)(1) (1993) of the ADA regulations, the City of Philadelphia (the "City") was required to install curb ramps" when it resurfaced city streets. As noted by the district court below, "The City [of Philadelphia] [did] not dispute the importance of installing curb ramps." *Kinney v. Yerusalim*, 812 F. Supp. 547, 549 (E.D. Pa.), *aff'd*, 9 F.3d 1067 (3d Cir. 1993). Rather, the City responded that

it was not required to install such curb ramps when it resurfaced the streets. In the alternative, the City argued that the requirement, as interpreted, would be an undue burden.

The district court rejected both arguments, and held that an "undue burden" defense was not available because the streets were not an "existing facility." In a footnote, the district court recognized that it was "aware of the heavy burden this will place on the City's limited resources." *Id.* at 552 n.4. The court noted, "It is unfortunate that Congress, in enacting this type of legislation, often fails to provide the means of financing the obligations it imposes." *Id.*

Implementation of the curb ramp regulation will place a heavy burden upon this nation's cities. That is well documented. In its opinion, the district court was merely recognizing two phenomena that have been ongoing since *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) was decided: the repeal of federal revenue sharing and the plethora of new, unfunded federal mandates handed down by Congress. Both phenomena have had a substantial impact on the States and cities, and implicate traditional notions of federalism and State sovereignty as preserved by the Tenth Amendment.

This Court has long recognized the importance of the system of dual sovereignty established by our Constitution. As this Court noted more than a hundred years ago, " '[W]ithout the States in union, there could be no such political body as the United States.' " *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991) (citing *Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227 (1869) (quoting *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101 (1869))). Although not

addressed by the parties below, this Court may, in its discretion, nonetheless consider the Tenth Amendment implications raised by this litigation. As members of this Court have recently noted, "On a number of occasions, this Court has considered issues waived by the parties below and in the petition for certiorari because the issues were so integral to decision of the case that they could be considered 'fairly subsumed' by the actual questions presented." *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1658 (1991) (Stevens, J., dissenting). Because the constitutionality of the regulations at issue is a question "antecedent" to whether they have been properly interpreted, and because the constitutionality of the regulations at issue is "ultimately dispositive of the present dispute," this Court may properly consider the Tenth Amendment implications. *Id.*

The decisions below also raise issues with regard to the proper standards for interpreting federal regulations. This Court has recognized that there may be certain core areas solely within the province of local governments. Congressional activity within these areas must be viewed with circumspection and, before such Congressional activity is validated, this Court must be absolutely certain that Congress intended to intrude upon such core local government functions. Amicus Curiae contends that the ability to set priorities with regard to resurfacing or repaving city streets is such a core area, and that the district court and court of appeals below erred when broadly construing the regulations to interfere with these traditional local government functions.

I. THE JUDGMENT BELOW RAISES IMPORTANT TENTH AMENDMENT ISSUES.

A. The Judgment Below Demonstrates That *Garcia* Can No Longer Be Regarded As Good Law.

1. The Reasoning in *Garcia* Is Now Flawed Because Congress Ended General Federal Revenue Sharing and Congress Is Now Appropriating Local Tax Funds to Achieve Federal Mandates.

This Court has stated that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of the Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.' " *Garcia*, 469 U.S. at 554 (citation omitted). This limitation may have once been adequate, but circumstances have changed so dramatically since *Garcia* that States are now vulnerable.

The majority decision in *Garcia* was written in the context of a different political and fiscal scheme. When this Court decreed an appropriate process was sufficient protection for the States' sovereignty, it did so in light of the existence of substantial federal funding to support Congressional mandates. In 1985, the federal government was still engaged in general revenue sharing. Thus, even if States had different priorities than Congress, federal mandates were less consequential because Congress paid for them. This Court itself stressed in *Garcia* that "federal grants

. . . account for about one-fifth of state and local government expenditures," and that "[t]he States . . . obtained federal funding for such services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation." 469 U.S. at 552-53.

In 1986, the federal government abruptly discontinued its practice of general revenue sharing. But it did not discontinue its practice of issuing federal mandates. Congress effectively shifted to the States and cities the burden of funding federal programs. In this context, the protections afforded by process have taken on an entirely new dimension. Today, if a State's or city's priorities do not accord with a federal mandate, the State or locality's sovereign right to establish those priorities is preempted—the local government is required to implement the federal program using its own monies that it might prefer to devote to other priorities. Thus, "failings in the national political process" now have unprecedented detrimental consequences on local revenues—local revenues raised to pave streets and build new roads, fight crime, fight fires, build schools and libraries, shelter the homeless, provide general relief, and operate courts, among other basic operations.

2. *Garcia* Is No Protection Because the Political Process Is Failing.

Despite repeated pleas to federal lawmakers for relief from unfunded federal mandates, no relief has been forthcoming. Many observers have noted that "federal lawmakers seem unwilling to confront voters with the true costs of public policy." *See, e.g.*, Diemer, *supra*. Moreover, while legislation has been introduced to limit unfunded federal mandates, S. 993 in-

troduced by Senator Dirk Kempthorne (R-Idaho), and H.R. 140 introduced by Representative Gary Condit (D-Cal.), "unfunded mandates have never been a hot button on Capitol Hill." *See* Diemer, *supra*, at 5A.[1]

The way the process works guarantees that it will fail. Congress is allowed to satisfy special interest lobbies with mandate legislation, but it is able to avoid political responsibility for the inevitable tax hikes caused by its legislation. As Senator Kempthorne noted, "Congress gets the credit. Local officials get the tab." McCarty, *supra*, at 6.

By continuing to pass unfunded federal mandates, but discontinuing federal general revenue sharing, Congress has taken advantage of the protections afforded to it by the majority in *Garcia*. This Court has recognized that Congress may " 'attach conditions on the receipt of federal funds,' " *see New York v. United States*, 112 S. Ct. 2408, 2423 (1992) (citation omitted), and may "offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 2424. This Court has further recognized that both methods are permissible because "[i]f a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to prob-

[1] This phenomenon is clearly demonstrated by reviewing the number of members lending support to the Kempthorne and Condit bills. Out of the 51 co-sponsors to Senator Kempthorne's bill, only 13 are Democrats. Similarly, out of the 132 co-sponsors to Representative Condit's bill, only 53 are Democrats. Without substantial Democratic support for such legislation, passage of any bill is problematic.

lems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not preempted." *Id.*

However, without federal general revenue sharing, State residents no longer have a choice. They can no longer elect to have the "Federal Government rather than the State bear the expense of a federally mandated regulatory program . . . ." *Id.* Congress, by enacting numerous unfunded federal mandates such as the ADA and the Residential Lead-Based Paint Hazard Reduction Act, has taken advantage of the procedural protections afforded in *Garcia*. The majority in *Garcia* made the seemingly logical assumption that, because the federal government had a "role in assisting state and local governments," procedural protections were sufficient. Once the federal government discontinued revenue sharing, undermining that assumption, it undermined the basis for *Garcia*.[2] While the federal role in assisting State and local governments has been dramatically diminished, Congress has hidden behind the protections of *Garcia* in usurping local sovereignty.

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[2] The flaw in this assumption was foreshadowed by Justice Powell in his dissent in *Garcia*. Justice Powell noted, "The Court believes that the significant financial assistance afforded the States and localities by the Federal Government is relevant to the constitutionality of extending Commerce Clause enactments to the States. . . . Regardless of the willingness of the Federal Government to provide federal aid, the constitutional question remains the same: whether the federal statute violates the sovereign powers reserved to the States by the Tenth Amendment." *Garcia*, 469 U.S. at 566 n.10.

The opinions of the courts below also demonstrate that the political process is failing. As Justice Powell noted in his dissent in *Garcia*, "The Framers recognized that the most effective democracy occurs at local levels of government, where people with first-hand knowledge of local problems have more ready access to public officials responsible for dealing with them." 469 U.S. at 575 n.18. Justice Powell further noted that "members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies. It is at these state and local levels—not in Washington as the Court so mistakenly thinks—that 'democratic self-government' is best exemplified." *Id.* at 577.

The decisions of the district court and the court of appeals below in effect obstruct this notion of "democratic self-government" by ordering localities to install curb ramps with local revenues and ordering them to defer other competing street repaving priorities determined by local government officials. In setting forth the regulations regarding a "transition plan," the Department of Justice encouraged public entities to "provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments." *See* 28 C.F.R. § 35.150(d)(1) (1993). The City of Philadelphia did just that and, as a result, established a transition plan reflecting the priorities and viewpoints of its citizens.

In its brief before the court of appeals, the City argued that its transition plan, which not only complies with the timetable set forth in the regulations, but which also reflects the priorities and needs of the City's citizenry, should govern when curb ramps are installed. The court of appeals addressed this argument in a footnote, stating that "[t]he City also contends that the ADA and the regulations must allow a local government to set its own priorities as to which streets will have curb cuts installed first." *Kinney v. Yerusalim*, 9 F.3d 1067, 1072 n.4 (3d Cir. 1993). While the court appears sympathetic to the City's position, it eventually concludes that "[n]evertheless, we cannot rewrite the plain language of the regulations." *Id.* The court further explained, "if, as we find below, a resurfacing is an alteration, curb cuts *must* be installed no matter what other priorities the transition plan may call for." *Id.* (emphasis added).

This argument cannot and should not be disregarded. As noted by the City in its Petition for Writ of Certiorari, "The crucial question is . . . whether the City may continue to adhere to its transition plan . . . ." or whether, consistent with the rationale of the courts below, the City will be forced to install "curb cuts whenever a street is resurfaced without regard to the priorities which the transition plan establish[ed] . . . ." Petition at 15. The City argues that "the only correct answer is that the City's transition plan" must govern the installation of such curb cuts. *Id.* The courts below reach a contrary result.

More importantly, the courts below, in effect, transfer the power to make local decisions from local and State governments to the "immense federal bureauc-

racy." Two results inevitably emerge when this type of transfer occurs. The first is that local and State governments become less responsive to local concerns. "Local concerns that exist are best handled by local government. . . . If the states are sapped of their energy and internal integrity by federal directives and federal tasks, the government bodies will not be able to respond effectively to the local issues consigned to them." Joseph Lipner, "Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean," 57 Geo. Wash. L. Rev. 907, 928 (1989).

The second result is that political accountability is diminished. As Justice Powell explained in his dissent in *Garcia*:

> Federal departments and agencies customarily are authorized to write regulations. . . . As is true of the original legislation, these are drafted largely by staff personnel. . . . These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they hardly are as accessible and responsive as those who occupy analogous positions in state and local governments.

469 U.S. at 576-77. Based on this reasoning, Justice Powell argued that it was disingenuous to think that the political process could protect States. How could it when those creating the law are unaccountable?

3. The Protections Created by This Court in *Garcia* Are Currently Inadequate; Therefore, This Court Must Assert Itself by Rewriting Those Protections to Protect the States From Congressional Mandates Such as the Curb Ramp Mandate Under the ADA.

Members of this Court have long recognized that "state sovereignty is a fundamental component of our system of government." *Garcia*, 469 U.S. at 573 (Powell, J., dissenting). This Court has defined its own role in policing the Tenth Amendment. "[J]udicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution." *Id.* at 570. This Court has also defined Congress's role vis-a-vis the Tenth Amendment: "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' . . . it is not without significance. The Amendment expressly declares the constitutional policy that *Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States*, 421 U.S. 542, 547 n.7 (1975) (emphasis added) (citation omitted). By enacting the ADA but not providing federal funds to implement its mandates, Congress has impaired the States' and cities' abilities to function effectively.

B. Congress Has Gone Beyond Its Authority In "Commandeering the States."

Congress enacted the ADA pursuant to its authority under the Commerce Clause. In the purpose section of the Act, Congress stated that it was invoking "the sweep of congressional authority, including the

power to enforce the fourteenth amendment and to regulate commerce . . . ." 42 U.S.C. § 12101(b)(4) (Supp. III 1992). There is no doubt that Congress's powers are vast. Pursuant to its spending powers, " 'Congress may attach conditions on the receipt of federal funds.' " *New York*, 112 S. Ct. at 2423. Moreover, "Congress has the authority to regulate private activity under the Commerce Clause." *Id.* at 2424. While Congress's powers under the Commerce Clause are plenary, *see National League of Cities v. Usery*, 426 U.S. 833, 840 (1976), they are not without limit. The Tenth Amendment limits those powers: "[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York*, 112 S. Ct. at 2418.[3]

This Court has repeatedly defined the nature of these Tenth Amendment limits. This Court has held, "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York*, 112 S. Ct. at 2429. Nor can Congress "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981). And, while the nature of these limits has at

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[3] Congress's authority pursuant to the Fourteenth Amendment is similarly not without limit. "[T]he Fourteenth Amendment does not override all principles of federalism." *Gregory*, 111 S. Ct. at 2405. "[T]his Court has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers." *Id.*

times seemed unclear, this Court has found, "Whatever the outer limits of [the Federal Government's] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 112 S. Ct. at 2435.

The case below presents a clear of example of Congress compelling the City of Philadelphia to administer the ADA. As the court of appeals noted, Congress advised the Department of Justice to follow the mandates of the Rehabilitation Act of 1973 when promulgating the regulations under the ADA. However, the Rehabilitation Act was enacted to prohibit discrimination on the basis of handicap in *federally assisted programs and activities.*

It is beyond argument that Congress may attach conditions to the receipt of federal funds. However, the Department of Justice in promulgating the rules of the ADA recognized that the prohibitions of the Rehabilitation Act were being extended to *all* activities of State and local governments, *including those that do not receive federal financial assistance.* The Department of Justice has admitted that this is not a matter of tied funding. Rather, it is a mandate to the States and localities to implement these regulations—regardless of where the funds to accomplish it are derived. Congress and the Department of Justice are using State and local bodies as "field offices of the national bureaucracy." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 777 (1982).

The funding for the curb ramp mandate and other ADA-related mandates will come from State and local coffers, which will place severe restraints on already tight budgets. This Court has held that determining

whether the Tenth Amendment has been violated involves an inquiry "into the direct and obvious effect of the federal legislation on the ability of the States to allocate their resources." *EEOC v. Wyoming*, 460 U.S. 226, 240 (1983). The multimillion-dollar burden of the curb ramp requirement obviously will negatively impact on the State and local governments' abilities to allocate their resources.

The Department of Justice itself seemingly has recognized this Tenth Amendment dilemma, and has prepared a statement regarding the federalism impact of the ADA rules. *See* 56 Fed. Reg. 35,694 (1991) (referencing Statement Concerning Federalism Impact (the "Statement"), available from the Department of Justice). In its two-and-a-half page Statement, the Department of Justice explained that, "in drafting [the Title II regulations] [it] has taken care to avoid options that would infringe on the principles of federalism." Statement at 2.

In taking care to avoid such options, the Department "conducted a review of the statute books of every State to identify existing requirements relating to treatment of individuals with disabilities." *Id.* The Department discovered that "[e]very State was found to have at least one or more laws addressing the rights of individuals with disabilities." *Id.* After reviewing these various State statutes, the Department concluded that "most of requirements established by [the Title II regulations] merely duplicate the requirements of existing State and Federal Laws." *Id.* at 3. The Department then perfunctorily noted, "Thus, the [regulations] will not impose substantial additional requirements." *Id.*

The Department of Justice's review of the federalism impact of these rules was misguided and disingenuous. The Department incorrectly assumed that, because there were already State laws regarding the disabled, the Title II regulations would pose no additional burden. This is far from true. If the Department of Justice had seen fit to conduct a budgetary study regarding the fiscal impact of the Title II regulations, it would have discovered that the regulations would indeed "impose substantial additional requirements."

II. THE COURTS BELOW SHOULD ADOPT A STRICT INTERPRETATION OF THE REGULATIONS PURSUANT TO THE PLAIN STATEMENT RULE—UNLESS CONGRESS INTENDED TO PREEMPT, IT SHOULD NOT BE FOUND TO HAVE DONE SO.

James Madison noted that there may be certain "core areas" solely within the province of the States. In The Federalist No. 45, he explained, "The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State," *cited in Garcia*, 469 U.S. at 570-71 (Powell, J. dissenting). Justice Day reiterated this concept more than 75 years ago when he stated, "The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government." *Hammer v. Dagenhart*, 247 U.S. 251, 275 (1918). This Court has held that to give State-displacing weight to federal law and preempt the historic powers of the States, "we must be absolutely certain that Congress intended such an exercise." *Gregory*, 111 S. Ct. at 2403.

Members of this Court have recognized that "maintaining streets" is a "classic example of the type of service traditionally provided by local government." *Garcia*, 469 U.S. at 578 (Powell, J., dissenting). Because the maintenance of city streets has long been recognized as a "purely internal affair," the courts below should have construed the regulations strictly, so as not to infringe upon the ability of local governments to govern themselves. However, the courts below construed the regulations broadly, so that Congress's mandate completely usurped a traditional government function.

CONCLUSION

The time has come for this Court to "again assume its constitutional responsibility." *Garcia*, 469 U.S. at 589 (O'Connor, J., dissenting). The regulations at issue herein are a perfect example of the unfunded federal mandates that have deluged our cities and States. The outcome of this case will affect not only Philadelphia, but all of this nation's cities. Moreover, the outcome may have a significant impact on the validity of other unfunded federal mandates. This issue must be addressed now. "If Congress is allowed gratuitously to order the states to perform federal tasks, it will not have to pay for what it gets. As ideas for federal projects grow but resources lessen, the incentives will grow stronger for Congress to command the state government to perform the federal programs for free." Lipner, *supra*, at 929.

As Professor Tribe has noted and this Court has recognized, "Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small

decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." Lawrence Tribe, *American Constitutional Law* § 5-20, at 381 (2d ed. 1988). This Court has recognized that it "has a continuing responsibility 'to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.' " *See South Carolina v. Baker*, 485 U.S. 505, 531 (1988) (quoting *Garcia*, 469 U.S. at 581) (O'Connor, J., dissenting). Amicus Curiae respectfully requests this Court again to recognize its responsibility and "not cast its lot with those who disbelieve in federalism and think that no steps should be taken to protect it." Lipner, *supra*, at 941.

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

BETTY SOUTHARD MURPHY
Counsel of Record

JOHN DANIEL REAVES
JOY MARY MACIEJEWSKI
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1500

Counsel for Amicus Curiae
The United States
Conference of Mayors